Appendices

A. Opinion, Court of Appeals for the Second Circuit, Filed July 17, 1980.

B. Order, District Court, S.D.N.Y., Entered January 2, 1980.

C. Opinion, District Court, S.D.N.Y., Entered October 17, 1980.

D. Memorandum Order, District Court, S.D.N.Y., Entered October 17, 1980.

E. Decision, New York State Commissioner of Education, April 10, 1979.

F. Decision, Independent Hearing Officer, January 12, 1979.

G. Judgment, Court of Appeals for the Second Circuit, Filed October 1, 1980.

H. Orders on Rehearing, Court of Appeals for the Second Circuit, Filed September 17, 1980.

I. Relevant Sections - Education of All Handicapped Children Act of 1975, 20 U.S.C. 1401, et. seq.

J. Relevant Sections - Education of the Handicapped Regulations, Assistance to States for Education of Handicapped Children, 45 C.F.R. Part 121a.

K. Regulations of the New York Commissioner, 8N.Y.C.R.R. 200.4(d)(4).

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1105—September Term, 1979

(Argued May 1, 1980 Decided July 17, 1980)

Docket No. 80-7098

Filed
July 17, 1980

AMY ROWLEY, by her parents and natural guardians, CLIFFORD and NANCY ROWLEY, and CLIFFORD and NANCY ROWLEY, in their own right,

Plaintiffs-Appellees,

v.

THE BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, WESTCHESTER COUNTY, and THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Defendants-Appellants.

Before:

MANSFIELD and TIMBERS, *Circuit Judges,*
and BONSAL, *District Judge.**

* Hon. Dudley B. Bonsal, United States District Judge for the Southern District of New York, sitting by designation.

Appeal from a judgment entered after a bench trial in the Southern District of New York, Vincent L. Broderick, *District Judge*, 483 F.Supp. 528, 483 F.Supp. 536, denying a motion by appellant Commissioner of Education to dismiss for lack of jurisdiction and directing appellants to provide a sign language interpreter in the classroom of appellee Amy Rowley, an eight year old deaf child.

Affirmed.

RAYMOND G. KUNTZ, Bedford Village, N.Y. (Teresa K. Kuntz, and Kuntz & Spletzer, Bedford Village, N.Y., on the brief), *for Defendant-Appellant Board of Education.*

PAUL E. SHERMAN, JR., Albany, N.Y. (Jean M. Coon, Albany, N.Y., on the brief), *for Defendant-Appellant Commissioner of Education.*

MICHAEL A. CHATOFF, Jamaica, N.Y., *for Plaintiffs-Appellees.*

DIANE SHISK, SEYMOUR DUBOW and MARC CHARMATZ, Washington, D.C.; Thomas K. Gilhool, Frank J. Laski and Beverly Lucas, Philadelphia, Pa., *filed a brief amici curiae for The National Association of the Deaf, Gallaudet College, and The American Coalition of Citizens with Disabilities.*

NORMAN H. GROSS, and McGivern, Shaw & O'Connor, Albany, N.Y., *filed a brief amicus curiae for The New York State School Boards Association.*

PER CURIAM:

This case is about Amy. She is eight years old. She is deaf and has been since birth. She needs a sign language interpreter in her classroom to enable her to have the same educational opportunity as her classmates. The district court, Vincent L. Broderick, *District Judge,* held that she is entitled by law to have such an interpreter. We agree and accordingly we affirm the judgment of the district court.

Amy Rowley presently is enrolled at the Furnace Woods School in the Hendrick Hudson Central School District, Peekskill, New York. In accordance with the requirements of federal law, The Education for All Handicapped Children Act of 1975, 20 U.S.C. § 1401 *et seq.* (1978) (the Act), the School District prepared an individualized education program for Amy.[1]

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1 Unless otherwise stated, all statutory citations in this opinion are to sections of the Act as codified in 20 U.S.C.

Section 1414(a)(5) provides:

"[T]he local educational agency or intermediate educational unit will establish, or revise, whichever is appropriate, an individualized education program for each handicapped child at the beginning of each school year and will then review and, if appropriate revise, its provisions periodically, but not less than annually".

In September 1978, when Amy entered the first grade, her program was prepared by the School District's Committee on the Handicapped and her teacher. Under the program Amy was placed in a regular

Her parents objected to the program because no provision was made for a sign language interpreter. Accordingly, they commenced proceedings under New York law for the administrative review provided by the Act.[2] When the School District's decision not to provide an interpreter was upheld by the Commissioner of Education of the State of New York, the Rowleys, individually and on behalf of Amy, commenced the instant action in the Southern District of New York under Section 1415(e)(2).[3] The School District was

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classroom and was provided with an FM wireless hearing aid. She was assigned to a one hour session each day with a tutor for the deaf and three hour-long sessions each week with a speech therapist.

The same services are still being provided. Although Amy is now in the second grade, the issue presented in this case is the same for both school years.

2 Procedural safeguards for the provision of free appropriate public education to handicapped school children are set forth in Section 1415.

Following the procedure established by the State of New York, the Rowleys first requested the District's Committee on the Handicapped to reconsider its recommendation. When the Committee finally refused to recommend that an interpreter be provided, the Rowleys appealed to an Independent Hearing Officer. The Officer upheld the decision of the Committee. His decision was appealed by the Rowleys to the Commissioner of Education of the State of New York.

3 Section 1415(e)(2) provides:

"Any party aggrieved by the findings and decision made [in the administrative proceedings pursuant to§ 1415] shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate."

named as defendant and the Commissioner subsequently was added as a necessary party defendant.

After a four day evidentiary hearing and after reviewing the records of the administrative proceedings, the district court made detailed findings of fact and concluded that Amy had been denied a "free appropriate public education" provided by the Act.[4] The court ordered the School District and the Commissioner to provide an interpreter during Amy's academic classes. 483 F.Supp. 528. The court also denied the Commissioner's motion to dismiss for lack of jurisdiction. 483 F.Supp. 536. From the judgment entered on the decisions of the district court, the School District and the Commissioner have appealed.

Our careful review of the record satisfies us that the district court's findings of fact are not clearly erroneous, but are adequately supported by the evidence. We also agree with the district court's conclusions of law. Accordingly, we affirm substantially

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4 The Act requires that all state and local educational agencies which receive funds under the Act provide each handicapped child with a "free appropriate public education". Sections 1412(1), 1414(a)(1).

A "free appropriate public education" is defined in Section 1401(18) as

> "special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate pre-school, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title."

Appellants concede that the definition of "special education", Section 1401(16), and "related services", Section 1401(17), and regulations promulgated pursuant to the Act, are sufficiently broad to encompass a sign language interpreter. Appellants nevertheless claim that an interpreter is not required in Amy's case.

for the reasons set forth in Judge Broderick's well-reasoned opinions of January 15, 1980, adding only the following brief observations of our own—chiefly to focus upon certain critical evidence.

Amy is the child of deaf parents. Since her birth, her parents have communicated with her by a method which includes the use of sign language, visual cues, the mouthing of words, and amplification.

Amy is a bright child. Despite her handicap, she performs above the median standard of her class. The district court attributed this to her intense desire to learn and the extraordinary degree of additional academic help and support she receives from her parents.

Like many deaf people, Amy has some residual hearing. In her classroom she uses an FM wireless hearing aid. She also reads lips. This is a limited skill, however, under the best of conditions. Many sounds are not visible on the lips and communication is impossible when the teacher and students are not facing Amy.

The district court found, based on the evidence before it, including Amy's auditory speech discrimination tests, academic records, and observations of her in the classroom, that Amy misses a substantial part of what goes on in her classroom. The court found that, while only 59% of what transpires is now accessible to Amy under her present individualized education program, with a sign language interpreter 100% would be accessible to her.

The court therefore concluded that the services of an interpreter were needed "to bring her educational opportunity up to the level of the educational opportunity being offered to her non-handicapped peers." 483 F.Supp. at 535. The court held that Amy was entitled by law to have an interpreter during any

school period when academic subjects are taught. We agree.

Section 1415(e)(2), *supra* note 3, provides that the district court's decision must be based "on the preponderance of the evidence".[5] The decision in the instant case clearly is supported by a preponderance of the evidence. Moreover, the court weighed and evaluated the evidence with great care. In affirming the judgment of the district court, we are satisfied that the court meticulously applied precisely the standard prescribed by Congress.[6]

Finally, we wish to emphasize the narrow scope of our holding. This is not a class action in which the needs of all deaf school children are being determined. The evidence upon which our decision rests is concerned with a particular child, her atypical family, her upbringing and training since birth, and her classroom experience. In short, our decision is limited to the unique facts of this case and is not intended as authority beyond this case.[7]

Affirmed.

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5 This is a different standard of proof than that which originally had been proposed. The initial bill passed by the House had provided that the determination of the state agency would be "conclusive in any court of the United States if supported by substantial evidence. . . ." H.R. 7217, 94th Cong., 1st Sess., *reprinted in* H.R. Rep. No. 332, 94th Cong., 1st Sess. 56 (1975).

6 Appellants also bring up for review the district court's ruling which admitted in evidence three affidavits which were attached to appellees' petition for review by the Independent Hearing Officer, but were not considered by him. We find it unnecessary to reach this claim, since the statutory standard of proof by a preponderance of the evidence has been compiled with in this case without reliance on the affidavits.

7 A majority of the panel of this Court which heard this appeal on May 1, 1980 voted shortly thereafter to affirm the judgment of the

MANSFIELD, *Circuit Judge* (Dissenting):

I respectfully dissent on several grounds. First, the district court, unaware that the Education for All Handicapped Children Act of 1975, 20 U.S.C. §§ 1401, *et seq.*, already defines a "free appropriate public education," adopted an erroneous and impractical guideline or standard for determining whether a handicapped child's education is "appropriate" within the meaning of the pertinent sections of the Act, 20 U.S.C. §§ 1401(18), 1412(1), 1414(a)(1)(C)(ii), and regulations promulgated thereunder. Second, the court should first have given the state educational authorities, who have much more expertise in the education of handicapped children than the court, the opportunity to apply the proper standard and submit their determination before deciding the case. Third, in view of the paucity of evidence supporting the district court's findings, I believe the court erred in considering crucial hearsay affidavits that were not properly a part of the state administrative record or in evidence before it without giving the defendants an opportunity to cross-examine the affiants and offer rebuttal proof.

First a bit of undisputed background. The Education for All Handicapped Children Act of 1975, 20 U.S.C. §§ 1401, *et seq.* (the "Act"), obligates state and local educational agencies, as a condition to receiving federal grants under the Act, to develop and submit to the United States Commissioner of Education, a policy and

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district court and to do so pursuant to a provision of the Rules of our Court which would preclude citation of our decision as authority in any other case, thus recognizing what we believe to be the lack of precedential character of our decision in view of the unique facts of this case. We continue to adhere to this view.

procedure that will insure handicapped students a "free appropriate public education," 20 U.S.C. § 1412(1),[1] which is defined in 20 U.S.C. § 1401(18) as follows:

> "(18) The term 'free appropriate public education' means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title."

See also 45 C.F.R. § 121a.4.

A "special education" is defined, 20 U.S.C. § 1401(16), as follows:

> "(16) The term 'special education' means specially designed instruction, at no cost to parents or guardians, to meet the *unique needs* of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions." (Emphasis added).

See also 45 C.F.R. § 121a.14.

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1 Title 20 U.S.C. § 1412(1) provides:

"§ *1412. Eligibility requirements*

"In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Commissioner that the following conditions are met:

"(1) The State has in effect a policy that assures all handicapped children the right to a free appropriate public education."

"Related services" are defined, 20 U.S.C. § 1401(17), as follows:

> "(17) The term 'related services' means transportation, and such developmental corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children."

See also 45 C.F.R. § 121a.13.

Regulations promulgated under the Act, although they define in detail the term "audiology" and refer to specific services and equipment to be furnished as "related services" to children with hearing problems, 45 C.F.R. § 11a.13(b), do not refer to a sign language interpreter.

The Act and regulations thereunder require the state to formulate and revise annually an individualized education program (IEP) for each handicapped child, 20 U.S.C. § 1414(a)(5), and the parents of the child are entitled to participate in the development of the IEP, 20 U.S.C. § 1401(19). The handicapped child must be placed in the least restrictive educational environment, i.e., educated in classrooms with non-handicapped children, 20 U.S.C. § 1412(5)(B). They may be removed to special classes, separate schooling, or other locations, only if the severity of the handicap prevents education

in regular classes. 20 U.S.C. § 1412(5), 45 C.F.R. § 121a.550-556.

The State of New York has enacted legislation and promulgated regulations with respect to the education of handicapped children, which largely parallels the Act and federal regulations. N.Y. Education Law, §§ 4201-4210, 4351-57, 4401-09 (McKinney's); 8 N.Y.C.R.R. §§ 200.1, *et seq.* State law does not require provision of a sign language interpreter for deaf children. The state's plan outlining its policy and procedure for education of handicapped children pursuant to the Act has been approved by the United States Commissioner of Education.

Amy Rowley attends the Furnace Woods School in the Hendrick Hudson Central School District, where she commenced as a kindergarten pupil in 1977 and has progressed through the first grade into the second. She is largely deaf, but can distinguish vowel sounds and has significant residual hearing in the lower frequencies. The record is clear beyond dispute that the school authorities, in their efforts to comply with applicable state and federal laws, have made Herculean efforts to provide Amy with an education suitable to, and compensating for, her hearing deficiency, and that their efforts have so far met with remarkable success. With her deaf parents' approval, she was from the outset placed in a regular classroom setting. In anticipation of Amy's arrival, those teachers and administrators who would be communicating with her as the school's only deaf child took a special course in sign language. The School District purchased a teletype system to communicate visually with her parents, who are also deaf. After she was tested to determine her hearing level, she was provided with supplemental educational services,

including the regular services of a speech therapist. After trying several hearing aids it was decided that she should be furnished with an "Earmark F.M. Wireless," a discrete sound amplifying device which increases particular sounds but blocks out background noise. This has been successfully used by her.

To assay whether Amy would benefit from sign language interpretation the Board of Education of the Hendrick Hudson Central School District (the District) from February 27 to March 10, 1978, placed a sign language interpreter, Jack Janik, with her in her classroom. At the conclusion of his testing period the interpreter reported that she was functioning like any of the nonhandicapped children in the room and that she resisted interpretation, looking to the teacher rather than the interpreter and asking the teacher rather than the interpreter to repeat anything she did not understand. To the same effect Amy's first grade teacher, Regina Gloverman, testified before the state hearing examiner that when Amy's tutor for the deaf, Susan Williams, used sign language to tell Amy what Mrs. Gloverman was saying in class, Amy looked to Mrs. Gloverman, who uses sign language in communicating with Amy, rather than to the sign language interpreter for what was being said. When Amy was subjected to a sign language interpretation test in her second grade classroom by Dr. Norman Doctor, who acted as the teacher with Edward Cortez as sign language interpreter, she looked to Dr. Doctor, asking him to repeat whatever she failed to understand, rather than to the sign language interpreter.

In view of the foregoing lack of success in using the services of a sign language interpreter in the education of Amy, her school district concluded that one should

not be provided in her case. Susan Williams, the teacher of children with impaired hearing who was Amy's language tutor, testified on the basis of her working closely with Amy daily that a sign language interpreter would not make a significant difference in Amy's education but would, on the contrary, deter her interactions with her teacher and other children in the classroom. This testimony was corroborated by Ellen Garzione, a hearing therapist who worked with Amy three times a week for a half-hour each session, that a sign language interpreter would not be of any assistance to Amy, since she was achieving as well as, or better than, most other first graders. In the light of this persuasive evidence the Committee on the Handicapped of Amy's School District sensibly concluded that at least for the time being the appropriate education for Amy, tailored to her unique needs, was to continue with the supplemental services she was currently receiving, including teachers who had developed special knowledge in education of the deaf, the use of the F.M. Wireless set, one hour of instruction daily by a certified teacher of the deaf, and three hours of instruction weekly by a speech therapist.

For the most part these witnesses called by the defendants testified on the basis of their personal observation of Amy and assessment of her special needs and performance. Among the factors considered by them was her residual hearing (her father testified that it was "50%"), her performance on achievement tests, her development of facility at lip-reading, her ability to understand what was transpiring in her class, and her classroom activities. She is able to read and spell, to handle mathematics and help other children having difficulty, to score well in tests, and to gain a friendly

cooperative acceptance on the part of her teacher and fellow-students. An expert audiologist, Dr. Ann Mulholland, testified on the basis of her clinical experience with Amy's case that her education was appropriate and adequate.

In contrast to defendants' witnesses, none of the witnesses called by the plaintiff (either in the state administrative proceeding or at the later district court trial) testified on the basis of any personal observation of Amy in the classroom or knowledge of her individualized needs and activities. Instead, despite the statutory scheme of the Act, which prescribes a special program to suit each child's unique education needs, 20 U.S.C. §§ 1401(19), 1414(a)(5), they relied on the general principle that the best education for any deaf person is the "total communication" method, which includes sign language as one of its parts. In their view, which was accepted by the district court, "*every* deaf child fares better in class with an interpreter. 'Every' deaf child includes Amy Rowley." Their conclusion was based entirely on general formulations and guidelines, without reference to Amy's individual needs.

DISCUSSION

At the outset it should be noted that Judge Broderick premised his opinion on two basic errors. One is his misconception that "The Act itself does not define 'appropriate education'." On the contrary, the Act and regulations promulgated thereunder do define the term, see pp. 1-2, *supra*, and also define the terms "special education" and "related services" as used in the definition of "free appropriate education." For present purposes, the important aspects of these definitions is

that they (1) emphasize that the education "meet the standards of the State educational agency," (2) specify that the education be tailored to the "unique needs of the handicapped child" in each instance, and (3) nowhere mention or suggest use of a sign language interpreter, despite referring to specific services and devices that might be used in treating children with hearing loss (e.g., "lip-reading," "determination of the child's need for group and individual amplification, setting and fitting an appropriate aid").

Thus the scope and range of an appropriate education is left primarily to the states, which are given broad authority to prescribe the details of educational policy in individual cases and must present specific plans for approval to the United States Commissioner of Education who, if he finds that a state's plan is not in conformity with the Act and federal regulations thereunder, may withhold funding, with the state given a right of appeal to a federal court of appeals, 20 U.S.C. § 1416. See, e.g., *Epperson v. Arkansas,* 393 U.S. 97, 104 (1968) ("By and large, public education in our Nation is committed to the control of state and local authorities").

Pursuant to the Act the State of New York has adopted parallel legislation and the State Commissioner has promulgated specific regulations which do not require provision of a sign language interpreter. Moreover the state's plan for education of handicapped children, which does not provide for sign language interpreters, has been approved by the federal Commissioner. In view of the approved plan's specificity with respect to audiology services, and the statute's policy in favor of administrative determination of what services are appropriate, a very strong showing is required to

depart from that policy. The showing here does not meet that test.

The second basic erroneous premise underlying Judge Broderick's decision was his use of a definition of "appropriate education" found in regulations promulgated under an entirely different statute that does not apply here, the Rehabilitation Act of 1873, Pub. L. 93-112, 29 U.S.C. §§ 701, *et seq.*, see 45 C.F.R. 84.33(b), which is designed to promote gainful employment for handicapped persons by developing rehabilitative services on an equal, non-discriminatory basis. Unlike the Education for All Handicapped Children Act of 1975, 20 U.S.C. §§ 1401, *et seq.*, which governs the present case, the Rehabilitation Act of 1973, 29 U.S.C. §§ 701, *et seq.*, contains provisions for vocational rehabilitation services which specifically include services of sign language interpreters, 21 U.S.C. §§ 774(d), 777e, showing that when Congress wished to provide such services it knew how to do so.

Unaware of the Act's definition and using a definition found in a regulation promulgated under a different Act for a different purpose, Judge Broderick formulated a new standard—"that each handicapped child be given an opportunity to achieve his full potential commensurate with the opportunity provided to other children"—which he borrowed from a law review note, The Education for All Handicapped Children Act of 1975, 92 Harv. L. Rev. 1103, 1125-26 (1979). No support for this definition is to be found in the Act, its legislative history, or in regulations promulgated thereunder. Had Congress intended such a definition it would have enacted it rather than the one which was adopted in 20 U.S.C. § 1401(18), *supra*. The legislative history of the Act reveals that Congress was simply

concerned with insuring that handicapped children would become independent, productive citizens rather than that their potentials be compared with those of the non-handicapped. The Senate Report on the proposed legislation states:

> "With proper education services, many would be able to become productive citizens, contributing to society instead of being forced to remain burdens. Others, through such services would increase their independence, thus reducing their dependence on society." S. Rep. No. 94-168, 94th Cong., 1st Sess., reprinted in [1975] U.S. Code Cong. and Ad. News, 1425, 1433.

This objective is confirmed by statements by various senators during debates on the bill.[2] In short, the aim of

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2 On June 18, 1975, Senator Williams, during the debates on the proposed Act, stated that

> "providing appropriate educational services now means that many of these individuals will be able to become a contributing part of our society, and they will not have to depend on subsistence payments from public funds." 121 Cong. Rec. 19492 (1975).

In debates with respect to the Conference Report on the Act he supported the previously expressed views of the Secretary of Health, Education and Welfare, stating that the goal of the Act was to enable handicapped persons to become "productive citizens, capable of contributing and even more, capable of self respect and pride which they so rightly deserve." 121 Cong. Rec. 37416 (1975). These views were endorsed by Senator Randolph, who stated that the bill must be passed "to give these children the educational services they need to compete in today's changing world." 121 Cong. Rec. 37410 (1975).

In the House Congressman Harkin expressed the same views, stating

> "With proper educational services provided now, at a young age, these children can become productive citizens, contributing to society instead of being left as burdens on our society." 121 Cong. Rec. 25541 (1975).

the Act is to develop a handicapped child's self-sufficiency.

The definition of "appropriate" education adopted by the district court, moreover, is unfeasible and imposes a standard that is impractical, if not impossible, to use as a means of evaluating the appropriateness of a handicapped child's education. The district court indulged in understatement when it observed:

> "The difficulty with the standard, of course is that it depends on a number of different measurements which are difficult to make. It requires that the potential of the handicapped child be measured and compared to his or her performance, and that the resulting differential or 'shortfall' be compared to the shortfall experienced by nonhandicapped children."

Attempting to evaluate an individual child's potential is an extremely difficult task, involving much speculation. "The response to almost any interesting question concerning the education of the handicapped is either that the answer is unknown or that no generalizable beneficial effect of a given treatment can be demonstrated," Kirp, Buss & Kuriloff, *Legal Reform of Special Education: Empirical Studies and Procedural Proposals,* 62 Cal. L. Rev. 40, 47 (1974). The district court's definition would compound this problem by requiring educators to subject all nonhandicapped children in the same school district, or at least in the same class, to a battery of tests in an effort to determine their potentials and their relative shortfalls as compared with that of the handicapped child. The process, while theoretically possible, obviously imposes an impossible burden.

The language and legislative history of the Act demonstrate that Congress visualized a much more practical objective, i.e., an education for each handicapped child that would enable the child to be as free as reasonably possible from dependency on others, would enable the child to become a productive member of society, and would hopefully promote academic achievement by the child that would roughly approximate that of his or her nonhandicapped classmates. A child's unique needs are met whenever the child's IEP enables the child to meet those goals. See, in accord, *Armstrong v. Kline*, 476 F. Supp. 583, 604 (E.D. Pa. 1979). Judged by this standard, the IEP for Amy clearly complies with the Act without her having a sign language interpreter. She has an IQ of 122. Her scores on the Stanford Achievement and Metropolitan Achievement Tests are above her grade level and show that she is living up to the potential indicated by her IQ. Although one debatable test indicates she hears only 59% of the words spoken in class, her classmates probably hear substantially less than 100% due to inattention, daydreaming, and other causes.

The most important fact for our purposes is that Amy is performing academically above the median of her class, will become a productive member of society, and is well adjusted to her school, teacher and classmates. The district court's statement that her "IQ does not represent the full measure of her potential" is a generality, supported only by the suggestion of persons who never witnessed her in a classroom context, and thus are reduced to speculation. On the opposite side of the ledger is the view that provision of a sign language interpreter would not prepare her for later life in a world where she will not have such an

interpreter available at her elbow but will be forced to achieve self-sufficiency in society through lip-reading and maximization of the effectiveness of her residual hearing.

Since application of the proper standard could yield but one result, the action in my view should have been dismissed. But if doubt on that score existed, the proper procedure here, where there is substantial evidence pointing in different directions on the issue of whether Amy needed a sign language interpreter, was for the district court to remand her case to the state educational authorities for findings and conclusions based on application of the correct standard, before resolving the issues presented by this lawsuit. The rationale of this procedure is obvious: the state educational personnel have far more experience and greater expertise in this difficult area than does a district court. Appraisal of the evidence by those possessing superior capacity to do so, who would recommend disposition based on application of the correct standard would not only be of invaluable assistance to the court but would avoid the flood of litigation that may be expected in cases where the state educators have initially denied a child's application. Without denying the child the "second bite at the cherry" authorized by the Act, 21 U.S.C. § 1415(e)(2), this step also has the virtue of being consistent with the normal judicial procedure of allowing expert agencies the first opportunity to resolve difficult technical issues within the areas of their expertise. See, e.g., *Far East Conference v. United States,* 342 U.S. 570, 574 (1952). In making determinations based on specialized knowledge federal courts usually are less inclined to substitute their judgment for conclusions of

a specially trained hearing examiner than they otherwise would be.

Lastly, the district court erred in admitting into evidence and relying on certain additional hearsay proof directly relevant to the issues before it, prior to deciding the case. At trial the plaintiffs offered into evidence certain affidavits (Nancy Rowley, Mary Sheie and Michael Denninger) bearing on the question of whether Amy required a sign language interpreter, which had been excluded from the state record because they had been submitted after that record had been closed, 8 N.Y.C.R.R. 200.5(c)(8)(10).[3] On October 5, 1979, Judge Broderick sustained objections to the affidavits as hearsay and as not properly part of the record before the State Commissioner of Education but

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3 8 N.Y.C.R.R.§ 200.5(c)(8)(10) provides in pertinent part:

"(c) . . . an impartial, formal hearing . . . shall be conducted in accordance with the following rules:

* * * * *

"(8) The parents, school authorities and their respective counsel shall have an opportunity to present evidence and to confront and question all witnesses at the hearing. *Each party shall have the right to prohibit the introduction of any evidence the substance of which has not been disclosed to such party at least five days before the hearing.*

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"(10) The impartial hearing officer shall render a decision and mail a copy of the decision to the parents and to the Board of Education not later than 45 calendar days after the receipt by the Board of Education of a request for a hearing. *The decision* of the impartial hearing officer *shall be based solely upon the record* of the proceeding before the impartial hearing officer, and shall set forth the reasons and the factual basis for the determination. . . ." (Emphasis supplied).

Accordingly the State Commissioner of Education based his decision upon "a review of the record before the hearing officer," in accordance with the Act, 20 U.S.C. § 1415(c), which provides that the State educational agency "shall conduct an impartial review of such hearing."

allowed plaintiffs to brief the issue of admissibility in their post-trial memorandum. As a result the defendants took no steps to call the affiants for cross-examination or to offer rebuttal proof, since there was no need to do so. More than three months after the trial had been completed, upon filing his decision on January 15, 1980, Judge Broderick simultaneously reversed himself, holding that, although the affidavits would be objectionable as hearsay if offered in the first instance in the district court, the State Commissioner had erred in not admitting and considering them pursuant to 8 N.Y.C.R.R. 279.4,[4] which allows a party filing a

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4 8 N.Y.C.R.R. § 279.4, upon which the district court relied, provides:

> "279.4 *Initiation of Review.* The party seeking review shall file with the Office of Counsel of the State Education Department the petition for review including any written argument, memorandum of law, and additional documentary evidence, and the notice of intention to seek review where required, together with proof of service of a copy of such documents upon the other party to the hearing."

When read in context with other portions of § 279 it seems clear that the "additional documentary evidence" refers to exhibits that had been offered before or admitted by the Impartial Hearing Officer but not included in the appellate record furnished by the local board of education or school district, which is only required to file "A copy of the transcript and of the decision of the hearing officer," 8 N.Y.C.R.R. § 279.2.

The district court's interpretation not only clashes with 8 N.Y.C.R.R. § 2005(c)(8)(10) but would permit a petitioner to obtain a trial *de novo* before the Commissioner of Education based on affidavits submitted under the guise of "documentary evidence" which had never been considered, tested by cross-examination or rebutted before the Hearing Officer. Nothing in 8 N.Y.C.R.R. § 279.4 indicates that affidavits were intended to be included in the term "documentary evidence." Nor does the regulation obligate the Commissioner to accept or give any weight to untested affidavits belatedly submitted.

The injustice of the district court's interpretation in the present case is readily apparent. Nothing prevented the petitioners from submitting the affidavits or live testimony by the affiants to the

petition to file "additional documentary evidence." He concluded that he had therefore considered the evidence as part of the record before the state educational agency.

This was patently error, amounting to a denial of due process. Had the evidence been properly introduced and admitted in the state proceedings the defendant Henrick Hudson Central School District would have been afforded the opportunity to cross-examine the three affiants and offer rebuttal proof. But since it was excluded there for late filing, no such opportunity ever existed. Similarly, because of the district court's exclusion of the evidence until it decided the case, the defendant School District never had the opportunity in the federal proceeding to exercise this basic right. The effect was to decide the case on the basis of untested, unrebutted affidavits, which is improper.

The majority's holding that this error may be disregarded on the ground that there is sufficient evidence to uphold the district court's decision "without reliance on the affidavits" (majority opinion, fn. 6), simply will not hold water. The affidavits were essential to the plaintiff's case because they constituted the only evidence in favor of the plaintiff's position which was based on observation of Amy, as distin-

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Hearing Examiner. Nor do the State Commissioner's regulations preclude petitioners who are surprised by any of a Hearing Examiner's findings or conclusions from moving to reopen the hearing and record in order to accept the new affidavits and give the defendants an opportunity to call the affiants for cross-examination or to submit rebuttal testimony or other proof. But to submit the new affidavits at the appellate level deprives the defendants of these basic rights. The Act and the state regulations clearly contemplate a complete trial before the Hearing Examiner and a review by the Commissioner, not a second trial before the Commissioner.

guished from testimony plaintiff had introduced of witnesses who had never seen her in or out of the classroom and were basing their opinions on general views regarding the advantages of the "total communication" theory. Defendants, on the other hand, offered numerous witnesses who testified on the basis of their personal observations of Amy that she was receiving an appropriate education. Moreover, the importance of the affidavit evidence was recognized by Judge Broderick, who stated:

> "The testimony of the plaintiffs' experts, however, was clearly applicable to Amy. Two of the affidavits submitted were from experts who had actually observed Amy in class and were able to express opinions concerning her education specifically. (*See* affidavits of Michael Deninger and Mary Sheie.)."

Since Judge Broderick actually relied on the affidavits we are in no position to state what his opinion would have been if they had not been erroneously admitted and considered by him.

For the foregoing reasons, I would reverse the judgment below with directions to dismiss the complaint or, in the alternative, with directions to refer the issues to the state educational authorities for further findings and recommendations according to the proper standard, with the Rowley, Deninger and Sheie affidavits to be excluded unless defendants are afforded the opportunity to cross-examine them and to offer rebuttal evidence.

550—7-21-80 • USCA—4498

OUTPUT SYSTEMS, INC., 157 Chambers St., N.Y. 10007, (212) 374-1234

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMY ROWLEY, by her parents and natural guardians, Clifford and Nancy Rowley, and Clifford and Nancy Rowley, in their own right,

Plaintiffs,

-against-

THE BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, Westchester County, and THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Defendants.

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79 Civ. 2139 (VLB)

ORDER

VINCENT L. BRODERICK, U.S.D.J.

This court heard evidence in the above-captioned matter on September 26, 27, 28, and October 5, 1979. Upon the bases to be set forth in the opinion to be filed herein, I find that the plaintiff has established her right to the relief requested. Accordingly, the decision of the Commissioner of Education dated April 10, 1979 is reversed and it is hereby

ORDERED, that the defendants provide the plaintiff with the services of a certified interpreter for the deaf during any school period in which academic subjects are taught.

/s/ Vincent L. Broderick
Vincent L. Broderick, U.S.D.J.

New York, New York
December 28, 1979

Entered January 2, 1980.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMY ROWLEY, by her parents guardians, Clifford and Nancy Rowley, and Clifford and Nancy Rowley, in their own right,

79Civ.2139 (VLB)

OPINION

Plaintiffs,

-against-

THE BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, Westchester County, and THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Defendants.

VINCENT L. BRODERICK, U.S.D.J.

I.

Eight-year old Amy Rowley and her parents have brought this action under The Education for all Handicapped Children Act of 1975 ("the Act"), 20 U.S.C. Section 1401 et seq., to review the decision of the New York State Commissioner of Education upholding the denial by the board of education of the Hendrick Hudson Central School District of their request that Amy, who is deaf, be provided with the services of a sign language interpreter in the classroom.[1] A hearing was held before this court

on September 26, 27, 28 and October 4, 1979 on plaintiffs' motion for a preliminary injunction. At the conclusion of the hearing the parties stipulated that the hearing would take the place of a trial on the merits. I issued an order dated December 28, 1979 directing that a sign language interpreter be provided for Amy. This opinion contains my findings of fact and conclusions of law under Rule 52(a), Fed.R.Civ.P.

The central issue is whether the refusal to provide Amy with a sign language interpreter in the classroom, made by the school district and sustained by the commissioner, deprives her of the "appropriate education" required by law. For the reasons which follow, I find that the plaintiffs have established by a preponderance of the evidence Amy's right to a sign language interpreter in the classroom.

II.

The following constitute my findings of fact in this case:

Amy Rowley is a deaf child and therefore "handicapped" within the meaning of the Act. Like most deaf individuals, she has some residual hearing. Amy's residual hearing is particularly good in the lower frequencies, where vowel sounds are distinguished. Since vowel sounds are particularly hard to lipread, this gives her a substantial advantage over deaf children who do not have the same residual hearing.

Amy's parents are both deaf. Since the time that they discovered her deafness, not long after she was born, they have raised Amy with the use of total communication. "Total communication" is a relatively new system of deaf education methods -- mouthing words, amplification, signing, touching, and visual cues. Its hallmark is its emphasis on communicating with a deaf person by simultaneously mouthing words and signing them. Total communication has gained increasing acceptance among deaf educators since the release of studies indicating that deaf children raised in deaf housholds where total communication is used fare better academically and emotionally than other deaf children.

Amy's parents, concerned with helping her accommodate to her handicap, and with her total intellectual and emotional well-being, trained her as a very young child in receptive and communicative techniques. Largely as a result of their work with her, Amy entered school with a much better ability to communicate and receive information and to establish social contact than most deaf children. At present, in the second grade, she is an excellent lipreader and uses amplification to make optimal use of her residual hearing. Amy's mother spends at least one hour a day going over school work with her. In addition, Amy's tutor for the deaf, who spends one hour with her each day, prepares her for upcoming classes so that she can participate with a slight advantage over the other students.

In the year before Amy was due to enter kindergarten, her parents approached the administrators of the Furnace Woods School, a public school where their son, a child with normal hearing, was already enrolled, to alert them to her hearing handicap. The principal of the school, Joseph Zavarella, and the other school administrators and teachers involved in Amy's case responded very constructively to the challenge they faced. A number of them took a minicourse in sign language interpretation. A teletype phone was installed in the principal's office to facilitate communication with the Rowleys at home. They conferred with Amy's parents to work out a program for Amy.

According to an agreement reached between the Rowleys and the school, Amy's kindergarten year began with a data-gathering trial period during which she was placed in a regular kindergarten class without any support services. At the end of the trial period it was decided to provide her with an FM wireless hearing aid.

In February of the kindergarten year a sign language interpreter, Jack Janik, was placed in Amy's class full-time for a two-week trial period. At the end of that period, Mr. Janik submitted a report which concluded that Amy did not need his services for that kindergarten class. His conclusion was based on the extraordinary sensitivity of Amy's kindergarten teacher to her needs and on Amy's resistance to the in-

terpretive services. It is clear from the report, however, and from a subsequent affidavit filed by Mr. Janik in connection with these proceedings, that his recommendation was strictly limited to the particular class for which he had rendered the service, and did not rule out the necessity of interpretation in other classes or in subsequent academic years.

Federal law requires that an individualized education program ("IEP") be established or revised annually for every handicapped child, 20 U.S.C. Section 1414(a)(5), and that the parents of the child participate in the development of such a plan, 20 U.S.C. 1401 (19). In the fall of Amy's first grade year, the school district set out to draw up such a plan.[2] The first stage in that process was to obtain a recommendation from the school district's Committee on the Handicapped ("COH").[3] The COH received expert evidence offered by the Rowleys to the effect that the services of a sign language interpreter are important in the education of a deaf child, visited a class for the deaf, and heard testimony from school teachers and other personnel familiar with Amy regarding her academic and social progress. The COH recommended that Amy be provided with: a) continued use of the FM wireless hearing aid; b) the services of a tutor for the deaf for one class hour every day; and c) the services of a speech therapist for three hour-long sessions per week. The COH concluded that Amy did not need the services of an interpreter at that time.

That recommendation was forwarded to the Furnace Woods School where it was incorporated in the IEP being drafted by Amy's teacher. Amy's teacher never met or conferred with the Rowleys in developing the draft IEP. The balance of the IEP contained a summary of Amy's academic progress and a statement of academic goals.

On December 6, 1978, school personnel met with Amy's parents to discuss the draft IEP. The Rowleys concurred with the program in all respects but one: they insisted that their daughter needed the services of a sign language interpreter for her academic classes. The IEP was sent back to the COH for review. The COH stood by its earlier recommendation that interpretive services not be provided.

The Rowleys demanded and received a hearing before an independent examiner on their objection to the IEP. When the examiner rendered a decision against them, they appealed that decision to the Commissioner of Education. Upon receiving the commissioner's decision upholding the independent examiner, they brought this civil action.

Amy received the support services recommended by the COH and provided for in the IEP throughout first grade and continues to receive them now. The Rowleys' only quarrel with the defendants remains the failure to provide interpretive services for their child.

Amy Rowley, who is now in the se-

cond grade,[4] is a remarkably well-adjusted child. She interacts with her classmates fairly well, and can communicate with them. They are aware of and have learned how to adjust to her handicap when communicating with her.[5] She is able to help her classmates with school assignments, and is occasionally called on my the teacher to do so.

Amy's interaction with her teachers has been even more successful than her interaction with her peers. All her teachers have been sensitive to her handicap and have made efforts to accomodate their teaching methods to it as much as possible by using the FM wireless, by speaking clearly for her, and by using visual cues. She usually responds accurately to the teacher's instructions and notifies the teacher from time to time if she has missed something. Amy and her teachers have developed an extraordinary rapport; since she is a bright and eager child, they have demonstrated great respect for her and have given her special responsibilities.

The plaintiffs submitted the results of a variety of auditory speech discrimination tests performed on Amy over the course of a couple of years. These tests measure a deaf child's ability to identify words which are spoken to her.[6] On the basis of these tests, I find that by making use of her hearing aids and her lipreading skills, which she would be doing under ideal classroom conditions, Amy can identify 59% of the words which are spoken to her. With

the use of "total communication" she can identify 100% of the words spoken to her.

Words spoken by a familiar speaker in a familiar context are, of course, easier to identify than words spoken under test conditions. Amy's discrimination level might on that basis be assumed to be higher than 59% in a classroom situation. Classroom conditions, however, do not often approach the ideal conditions of the testing room. Amy is likely to hear a great deal less when there is noise in the classroom, when more than one person speaks at one time, when backs of speakers are turned to her or films are being shown. Accordingly, I find that Amy is capable of discriminating considerably less than 100% of what is spoken in class -- probably in the neighborhood of 59%.

The defendants introduced results of academic achievement tests Amy had taken in her first grade. Amy's scores on the Metropolitan Achievement Test were about average for her class, and her scores on the Stanford Achievement Test, which was administered to her in sign language, were well above average.[7] Amy's school records establish that she is performing above the median for her class. She has an IQ of 122.

Taken as a whole, this information establishes that Amy is a very bright child who is doing fairly well in school. It also establishes that she understands considerably less of what goes on in class than she could if she were not deaf. Thus she is not learning

as much, or performing as well academically, as she would without her handicap.

The parties introduced conflicting evidence regarding the importance of an interpreter in the early years. While I accept the defendants' evidence that an interpreter is less necessary for the transmission of mechanical skills in the early grades than for the increasingly academic instruction of higher grades, I also find that anything missed in the classroom early in the learning process will have far reaching consequences.

The parties were also in conflict regarding the potential for disruption of an interpreter in the classroom. I find that the plaintiffs have established that an interpreter could be integrated into the classroom in a way which will not disrupt the class or adversely affect Amy's social interaction.

III.

The Act requires that every state receiving federal educational assistance have in effect a policy "that assures all handicapped children the right to a free appropriate public education." Id. at 1412. The Act itself does not define "appropriate education". The regulations promulgated thereunder supply a functional explanation:

> (b) Appropriate education. (1) For the purpose of this subpart, the provision of an appropriate education is

> the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of non-handicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of Sections 84.34, 84.35, and 84.36. 45 CFR 84.33(b) (emphasis supplied).

In addition, the Act itself provides two guidelines. The first, a procedural guideline already referred to (see page 5, supra), requires that an individualized education program be developed for every handicapped child at a meeting with the child's parents and educators, 20 U.S.C. 1414(a)(5), 1401(19)[8]. The second expresses a strong preference for "mainstreaming" handicapped children; it provides that they are to be educated with non-handicapped children to the "maximum extent appropriate". 20 U.S.C. 1412(5)(B).[9]

Aside from the HEW regulation quoted above, it has been left entirely up to the courts and the hearing officers to give content to the requirement of an "appropriate education". While in future years a "common law" will undoubtedly evolve out of the Act to provide guidance for subsequent judicial decision-making, it is much too early yet to find it. Enforcing the Right to an Appropriate Education: The Education

for All Handicapped Children Act of 1975, 92 Harv.L.Rev. 1103, 1125-27 (1979) (hereinafter, "Appropriate Education").

An "appropriate education" could mean an "adequate" education -- that is, an education substantial enough to facilitate a child's progress form one grade to another and to enable him or her to earn a high school diploma. An "appropriate education" could also mean one which enables the handicapped child to achieve his or her full potential. Between those two extremes, however, is a standard which I conclude is more in keeping with the regulations, with the Equal Protection decisions which motivated the passage of the Act, and with common sense. This standard would require that each handicapped child be given an opportunity to achieve his full potential commensurate with the opportunity provided to other children. Appropriate Education, supra at 1125-26. Since some handicapped children will undoubtedly have the intellecutal ability to do better than merely progress from grade to grade, this standard requires something more than the "adequate" education described above. On the other hand, since even the best public schools lack the resources to enable every child to achieve his full potential, the standard would not require them to go so far.

The difficulty with the standard, of course, is that it depends on a number of different measurements which are difficult to make. It requires that the potential of the handicapped child be measured and compared to his or her per-

formance, and that the resulting differential or "shortfall" be compared to the shortfall experienced by non-handicapped children.

In an attempt to establish that they have met the standard, defendants have relied on measurements of Amy's academic performance and descriptions of her behavior. The Committee on the Handicapped based its recommendation on the testimony of Amy's teachers and others who had observed her academic and social performance. The committee rejected as "one-sided" the expert opinions offered by the Rowleys concerning the impact on a deaf child's comprehension of various forms of communication. Amy's principal, Dr. Zavarella, who was ultimately responsible for the preparation of the IEP, testified, before the hearing officer and before me, that only her academic failure would convince the school district that she needed the services of an interpreter. Before me the school board relied heavily on the observations of Amy made by her own teachers and by deaf educators who were dispatched to the classroom for the purpose of making such observations. In finding that Amy is a bright, well-adjusted child who has enjoyed a find rapport with all of her teachers and is able to respond to their instructions, I have accepted virtually all of that testimony as true.

While this evidence firmly establishes that Amy is receiving an "adequate" education, since she performs better than the average child in her class and is advancing easily from grade

to grade, it establishes little more. I find that the defendants' emphasis on her academic performance and the suggestion that only academic deficiencies would induce them to provide Amy with an interpreter are based on an erroneous understanding of the law; they ignore the importance of comparing her performance to that of non-handicapped students of similar intellectual calibre and comparable energy and initiative.

The defendants have tried to repair the deficiency in their presentation by arguing in their post-trial brief that Amy's performance on the Stanford Achievement Test, which was well above average, shows that she is measuring up to the potential reflected in her IQ score of 122. If accurate, this is precisely the kind of information which would be most relevant to my decision in this case. The argument, however, is not supported by any evidence the defendants offered. The most direct support it received is a statement by one of the plaintiffs' witnesses, Dr. Donald Moores, to the effect that the Stanford Achievement Test score was probably a better indication of Amy's potential than the somewhat lower Metropolitan Achievement Test score. This is hardly persuasive support for the proposition that Amy's scores establish that she is learning all she would be learing if she were not deaf.

Moreover, Amy's IQ does not represent the full measure of her potential. The defendants' own witnesses have established by their testimony Amy's ener-

gy, her intellectual assertiveness, her rapport with her teachers and her interest in learning. These are significant elements of her potential which are not reflected in her IQ but which are undoubtedly reflected in the results of her achievement and other academic tests. It seems likely that much of Amy's energy and eagerness goes into compensating for her handicap; if the need for some of that compensation were eliminated, her energy could be channeled into greater excellence in classroom performance. It is unfair and contrary to law to penalize her for her own efforts and those of her parents, by which she has remained slightly above the median of her class.

The plaintiffs did not attempt to pursue this line of proof. They did, however, supply circumstantial evidence of deficiencies in Amy's education; evidence that Amy is capable of discriminating much less than 100% of what is said in class. The inevitable inference from that evidence is that she is understanding much less than 100%. While speech discrimination and understanding are not coterminous functions, the latter is clearly impossible without the former. That deficiency in Amy's understanding supports the conclusion that her educational shortfall is greater than that of her peers. While it is true, as defendants contend, that no child understands 100% of what is taught in class, the failures of other children can be attributed either to lack of intellectual potential, in which case, there is no shortfall relevant to the

standard described above, or to a lack of interest or energy, factors which can be controlled and which it is the purpose of a school to develop. Amy's lack of understanding, by contrast, is inherent in her handicap and is precisely the kind of deficiency which the Act addresses in requiring that every handicapped child be given an appropriate education.

In a different vein, the testimony and affidavits of the plaintiffs' experts concerning the superiority of total communication as a tool of education lent support to the inferences drawn from the word discrimination test results. The defendants have contended that no expert testimony which is not based on observations of Amy and which does not express opinions about her education specifically has any relevance to the appropriateness of that education. The testimony of the plaintiffs' experts, however, was clearly applicable to Amy. Two of the affidavits submitted were from experts who had actually observed Amy in class and were able to express opinions concerning her education specifically. (See affidavits of Michael Deninger and Mary Sheie.) All of the other experts testified that every deaf child fares better in class with an interpreter. "Every" deaf child includes Amy Rowley.

While it is true that the law requires that the needs of each individual handicapped child be assessed, and in keeping with that goal eschews any general formulations or guidelines, as a

practical matter those needs cannot be assessed without reference to generally accepted methods of special education for the handicapped. Appropriate Education, supra at 1127. Ideally, we would examine Amy Rowley in isolation and determine the services needed to bring her educational opportunity up to the level of the educational opportunity being offered to her non-handicapped peers. Given the difficulty of making such an assessment, however, it is useful to consider Amy as a member of a class of similarly handicapped children, a class about which a good deal of useful information is available. The plaintiffs' experts established by their testimony, which was in this respect largely uncontradicted, that there is a marked trend towards the use of total communication in the education of the deaf -- a trend supported by studies showing the greater degree of success of students brought up in deaf households using total communication. If there is something unique about Amy's situation which renders these generalizations less applicable to her, it is a uniqueness occasioned in large measure by her superior intellectual and personal abilities, for which she should not be penalized.[10]

Having found that Amy's academic education would be more "appropriate" with than without an interpreter, I must yet consider any negative impact the interpreter would have on her social development. The defendants have contended that the presence of an interpreter would be disruptive and would

isolate Amy from her classmates by singling her out as a handicapped child. These assertions are largely based, however, on the testimony of individuals, like Amy's teacher, who have had no experience with interpreters in the classroom -- that is, on pure speculation. They are also based to some extent on the observations and recommendations of an interpreter who was placed in Amy's classroom for a two-week trial period in the spring of her kindergarten year. That recommendation, however, which purported to be applicable only to her kindergarten year, is already over a year and a half old. Defendants also invoke the interpreter's report, which describes Amy's refusal to follow him rather than her teacher, in support of the proposition that Amy will not make use of an interpreter's services. There is no indication, however, that Amy was adequately coached to respond to this change in her classroom setting, or that she was given enough time to adjust to it. It is hard for me to believe that a child who has been raised with the use of total communication cannot be taught to follow an interpreter.

One of the plaintiffs' experts, Dr. Donald Moores, who has had experience with interpreters in the classroom, testified that a sensitive interpreter can minimize his disruptive impact on the classroom. In addition, he pointed out that the FM wireless currently used by Amy in class, which operates through a transmitter which students pass from hand to hand when they are reading aloud, is also potentially disruptive and also

draws the attention of other students to Amy's handicap. All of the testimony offered by both sides, however, establishes that Amy's classmates have adapted without difficulty to the presence of the wireless and have accepted Amy as their peer. There is nothing in the record to suggest that they will respond to the presence of an interpreter any differently.

/s/
Vincent L. Broderick,
U.S.D.J.

Dated: New York, New York
January 15, 1980

Entered October 17, 1980.

FOOTNOTES

1. The suit was originally brought against the school board, but the Commissioner of Education was thereafter joined as a necessary party.

2. An IEP had been developed for Amy in her kindergarten year with which her parents had concurred.

3. The COH is made up a psychologist, an educator, a physician, and the parent of a handicapped child.

4. Procedurally, this case is before me in a rather awkward posture. Technically, this court has jurisdiction to review only the IEP developed for the 1978-79 school year, which has long since passed. A motion was made to dismiss for lack of jurisdiction on that ground, which has been discussed and denied in a memorandum order filed simultaneously with this opinion. Since administrative remedies have not yet been exhausted with regard to the 1979-80 IEP, that IEP is not on review here now. In spite of the limited scope of my reivew, however, evidence concerning Amy's current status is relevant to my determination of the "appropriateness" of injunctive relief at this stage. See 20 U.S.C. 1415(e)(2). For that reason many of my findings relate to the present as well as to the past school year.

5. Plaintiffs and defendants have offered conflicting evidence on the issue of Amy's social interaction in

class. The plaintiff has submitted affidavits by expert observers which note that she seems somewhat isolated and makes herself understood to the other children only about 50% of the time. The defendants' witnesses testified that she communicates quite freely and well with her classmates. Since the evidence offered by the defendants on this issue was current while that offered by the plaintiffs was over 6 months old, I have found that Amy communicates or interacts fairly well with her classmates. There is no evidence, however, to suggest that her interaction is any more than superficial.

6. Amy has submitted to at least two such tests, one of which was administered on several occasions. The tests are very similar in format: A word is spoken to the deaf child and she must match it to one of four pictures in the test booklet before her. The tests were administered to Amy under a variety of conditions. Their results can be summarized as follows:

Word Identification by Picture Intelligibility Test ("WIPI")
With hearing aids only: 80%

Goldman - Fristoe - Woodcock Test ("GFW")
With hearing aids only: 43%
Noise subtest: 27%
With lipreading aids and lipreading: 59%
With hearing aids and lipreading repeated: 84%
With total communication: 100%

I find that 59%, on the GFW test, is the most relevant test score. WIPI tests had apparently been administered to Amy on a number of occasions before the results recorded above were obtained -- so numerous that she became quite familiar with it. The tests during which she was allowed both to lipread and to use her hearing aids best simulated classroom conditions. The same GFW test was administered twice on the same occasion with hearing aids and lipreading. The first of them, administered when the test was still new to her, would seem to reflect her speech discrimination ability more accurately than the repeated test.

7. Specifically, her scores on the Metropolitan Achievement Test were:

	Grade Equivalent	Percentile
1. Word knowledge	2.5	86
2. Word analysis	2.2	84
3. Reading	2.1	78
1 + 3 total reading	2.2	78
4. Total math	2.1	62

These scores were about average for her class.

Her scores on the Stanford Achievement

test were:

	Grade Equivalent
1. Vocabulary	3.3
2. Reading	
Part A	1.9
Part B	3.5
3. Math concepts	4.0
4. Math computation	4.5
5. Listening comp.	5.7

8. Section 1414. Application

(a) A local educational agency or an intermediate educational unit which desires to receive payments under section 1411(d) of this title for any fiscal year shall submit an application to the appropriate State educational agency. Such application shall-

* * *

(5) provide assurances that the local educational agency or intermediate educational unit will establish, or revise, whichever is appropriate, an individualized education program for each handicapped child at the beginning of each school year and will then review and, if appropriate revise, its provisions periodically, but not less than annually;

Section 1401. Definitions

* * *

(19) The term "individualized edu-

> cation program" means a written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, ...

Plaintiffs have contended that the school board failed to comply with these procedural requirements in developing the IEP. In light of my disposition of this case on the merits, I find it unnecessary to reach that issue.

9. Section 1412. Eligibility requirements

> In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Commissioner that the following conditions are met:
>
> * * *
>
> (5) The State has established... (b) procedures to assure that to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped child-

> ren from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily, ...

10. Defendants also contend that Amy is unique by virtue of her substantial residual hearing and her very good lipreading ability. While that contention is supported by the evidence, it does not appear to have the significance attributed to it by the defendants. Most deaf children have at least some residual hearing, and Amy's is not so great as to affect her classification as deaf. Regardless of her residual hearing and lipreading skills, her ability to discriminate speech is at a 59% level -- well below that of normal children. In addition, the plaintiffs' evidence suggests that Amy's skill may be attributed at least in part to her early training using total communication. It is likely then that her skills will continue to develop if total communication is used in the classroom.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

AMY ROWLEY, by her parents and natural guardians, Clifford and Nancy Rowley, and Clifford and Nancy Rowley, in their own right,

Plaintiffs,

-against-

79 Civ. 2139 (VLB)

THE BOARD OF EDUCATION OF THE HENDRICK HUDSON SCHOOL DISTRICT, Westchester County, and THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

MEMORANDUM ORDER

Defendants.

VINCENT L. BRODERICK, U.S.D.J.

The facts of this case are set forth in the post-trial opinion filed simultaneously with this memorandum order. The purpose of this memorandum is to deal with two motions made during the course of the proceedings: the motion by the State Commissioner of Education to dismiss for lack of jurisdiction and the plaintiffs' motion to have included in the record affidavits which were attached to their petition to the Commissioner of Education but were apparently not considered by him in reaching his decision.

For the reasons which follow, I deny the defendant commissioner's motion and grant the plaintiffs' motion.

Amy Rowley is currently in the second grade of her neighborhood public school, the Furnace Woods School of the Hendrick

Hudson Central School District in Peekskill, New York. This is her third year in that school.

At a meeting held on December 8, 1978, Amy's parents, Clifford and Nancy Rowley, were presented with a draft of the individualized education program ("IEP") drawn up for Amy by her first grade teacher, setting out proposed educational goals and proposed support services for Amy's first grade year. As more fully set forth in the accompanying post-trial opinion, the Rowleys objected to the IEP on the grounds that it failed to provide for a sign language interpreter for Amy. The Rowleys demanded and received a hearing before an independent examiner, and subsequently appealed his adverse decision to the Commissioner of Education, who affirmed.

By following this procedure, the plaintiffs exhausted all of their administrative remedies concerning the 1978-79 IEP, and thus became entitled to bring this action for review. Before this case went to trial, however, a new school year had begun and a new IEP was due. The plaintiffs, understandably, will not be satisfied with a mere declaration that last year's IEP improperly failed to provide interpretive services; they seek an injunction to compel such services for the current year. In asserting this court's lack of jurisdiction, the commissioner has in essence argued that the plaintiff's may not seek relief applicable to the 1979-80 school year without exhausting their administrative remedies with respect to the 1979-80 IEP.[1]

Defendant commissioner appears to concede that the court has jurisdiction to review the 1978-79 IEP, as to which administrative review procedures were exhausted. Only mootness would strip the court of that jurisdiction. If mootness were accepted as a ground for refusing judicial review, the consequence might be that Amy's IEP would never have such review. Adoption of the 1979-80 IEP, which as of the time of trial had not yet been formulated, a hearing before an independent examiner and disposition of an appeal tc the commissioner would have to take place before the matter would once again be ripe for court consideration. The case would not reach court until mid school year at the earliest, and would be moot by the end of the year. Thus the conduct complained of is "capable of repetition, yet evading review," and calls for the invocation of a recognized exception to the mootness doctrine, e.g. Nebraska Press Association v. Stuart, 427 U.S. 539 (1976).

Having found that this court has jurisdiction to review the 1978-79 IEP, there is no need to find jurisdiction over the 1979-80 IEP. In a case in which jurisdiction is properly predicated on 20 U.S.C. Section 1415, the court is empowered to grant any "appropriate" relief, 20 U.S.C. Section 1415(e)(2), which would include injunctive relief extending beyond the school year at issue. Since the 1978-79 IEP should have contained a provision for a sign language interpreter (see accompanying post-trial opinion) and since Amy needs an interpreter just as much (if not more) in 1979-80 as she did in 1978-79, I find

that an injunction applicable to the 1979-80 school year is an appropriate form of relief.

II

Additional Evidence

At the hearing the plaintiffs moved to introduce affidavits which were attached to their petition to the Commissioner of Education, but which were apparently not considered by him in reaching his decision.[2] The defendants objected, contending that the commissioner properly refused to consider the affidavits and that they are not, therefore, a part of the record before this court.[3] I denied the plaintiffs' motion but permitted the parties to brief the issues and left open the possibility that my decision might be reopened. I now reverse my earlier decision and grant the plaintiffs' motion.

The Regulations of the Commissioner of Education, Section 279.4, provides that new matter can be filed in connection with the petition for review:

> Initiation of review. The party seeking review shall file with the Office of Counsel of the State Education Department the petition for review including any written argument, memorandum of law, and additional documentary evidence, and the notice of intention to seek review where required, together with proof of service of a copy of such documents upon the other party to

the hearing.

The respondent may also attach documents to his answer. Section 279.5.

The defendants appear to contend that while petitioners are allowed to submit documents, the commissioner may, in his discretion, refuse to consider them. Their interpretation would permit the commissioner to consider documents selectively -- to consider, for example, only those which support the commissioner's decision. That interpretation would raise serious due process and equal protection problems and would conflict with the plaintiffs' right under the federal statute to an "impartial review" at the state level. 20 U.S.C. Section 1415.

Defendants suggest, however, that the commissioner's discretion is not unfettered but rather guided by the following standard: only affidavits which contradict testimony offered at the hearing are rejected, unless there is some showing that they could not have been presented at the hearing. Since the defendants have failed to cite any authority for this proposition, I must assume that the practice is an unwritten one. As such, it operates to disadvantage individual petitioners who are less likely than school board respondents to be familiar with unwritten appeals procedures. Any reasonable person would infer from the regulation permitting attachment of documents that such documents will be considered by the commissioner; any other interpretation would render the procedural directions an exercise in futility. Accordingly, the commissioner is estopped

from denying his obligation to review such documents; they were a part of the record before him, which he erred in failing to consider, and they are a part of the record before this court.

SO ORDERED.

s/
Vincent L. Broderick, U.S.D.J.

Dated: New York, New York
January 15, 1980

Entered October 17, 1980.

FOOTNOTES

1. Before the joinder of the commissioner in this action, the plaintiffs and defendant School Board stipulated to put the appropriateness of the 1979-80 placement before the court without regard to the exhaustion requirement. As the defendant commissioner has quite accurately pointed out, however, the parties have no power to confer subject matter jurisdiction on the court by agreement.

2. The commissioner based his decision on "a review of the record before the hearing examiner." (Commissioner's Decision No. 9954, p. 3).

3. The documents consisted primarily of affidavits which would be objectionable as hearsay if sought to be introduced at the district court level.

No. 9954

The University of the State
of New York
The State Education Department
Before the Commissioner

IN THE MATTER OF THE

Application of a handicapped child, by her parents, for review of a determination of a hearing officer relating to the provision of educational services by the Hendrick Hudson Central School District.

Michael A. Chatoff, Esq.
attorney for petitioners

Raymond G. Kuntz, Esq.
attorney for respondent

Petitioners appeal from the decision of an impartial hearing officer which sustained as appropriate the placement of their hearing-impaired daughter in a regular first grade class with supportive services provided by respondent. They seek an order directing respondent to appoint a sign language interpreter to aid and interpret for the child when academic subjects such as reading, mathematics, writing and spelling are being taught in the classroom.

Petitioners' child, who has a se-

vere hearing impairment, first attended kindergarten at the Furnace-Woods School in the respondent district during the 1977-78 school year. Prior to her entry there, the parents and school officials met to consider whether a regular classroom placement would benefit the child and what, if any, supplemental educational services should be provided in light of her handicapping condition. The parties ultimately agreed to place the child in a regular kindergarten program without any supplemental services at first so as to enable the district to have base data from which to evaluate the child's needs for such services.

During that year, the child was provided with the services of a speech therapist, and tests were conducted with an FM wireless system to determine if such a system would enhance the child's auditory perception. The child's physical skills, social interactions and maturation level were observed and tested throughout the year and the results were shared with petitioners. From February 27 to March 10, 1978, respondent placed a sign language interpreter in the child's classroom, and his presence there and its affect on petitioner's daughter were evaluated by the school principal and by the interpreter himself. In his written report made and filed at the conclusion of the two-week testing period the interpreter stated:

> "In general, interpreting was resisted by the child almost consistently except during story telling time which was approximately twenty minutes

a day for three days a week. The child functions like any of the other children in the classroom. She participates in all activities and assignments without any major problems. Her understanding of the English langue and how it works is average to above which makes it a lot easier lip-reading on her part since prior understanding of the language is conducive to lip-reading of same. As skillful as she is, the child does not get everything and when she does miss something, she stops the person and has the message repeated. In conclusion, I would like to say that as far as interpretive services are concerned, they are not needed at this time."

At the beginning of the 1978-79 school year, respondent's committee on the handicapped met and reviewed the child's academic performance in the kindergarten program at Furnace-Woods. On the basis of its review which included the interpreter's report, the committee recommended that the child continue at Furnace-Woods in a regular first grade program and be provided with certain supplemental services. The services include individualized instruction by a certified teacher of the deaf one hour per day and speech, auditory and speechreading training by a teacher of the speech and hearing handicapped on an in-

dividual basis for three hours per week.

Petitioners disagreed with the propriety of the committee's recommendation, in that it failed to provide for the services of a sign language interpreter, and requested a hearing, which was held on December 20, 1979.

The hearing officer found that respondent was providing the child with an appropriate educational program and that petitioners had failed to establish that a sign language interpreter is presently needed in the classroom setting while academic subjects are being taught.

From a review of the record before the hearing officer, I find that there was substantial evidence to support his findings and conclusions.

The basic contention of the petitioners is that the best way to impart information to a deaf person is through the use of "total communication", which they define as the simultaneous use of sign language, finger spelling and audible speech. The total communication method is being used in the home when communicating with the child and it is the parents' wish that this same method be used in the school setting with the aid of a sign language interpreter. In support of their contention, petitioners have submitted an affidavit by Robert Davila of Gallaudet College. Although Dr. Davila's affidavit is informative and does support the use of total communication as a general concept, there is no indication that he has ever met

petitioners' daughter, observed her in a classroom setting, reviewed her records or tested her for academic achievement. Several other documents supportive of the general concept of total communication were also submitted by petitioners, but again those documents do not address the educational development of the child in question. I also note that neither petitioner has ever observed the child in the present classroom setting, nor do they allege that she has not been progressing educationally, academically or socially.

The witnesses who testified on behalf of respondent clearly indicate that the child is progressing satisfactorily in her present placement and is considered at the top of the middle group in her class. The child's first grade teacher stated that the youngster has learned addition, subtraction and reading since coming to her class and, is in fact capable of assisting other pupils in the class. The child's other teachers and the school principal who have been observing her on a daily basis also agree that satisfactory progress is being made and that the presence of a sign language interpreter is not required at this time.

Since the petitioners have failed to show that the present placement offered by respondent is inappropriate, inadequate or unsuitable, there is no legal basis to grant the relief requested.

THE APPEAL IS DISMISSED.

(SEAL) IN WITNESS WHEREOF, I, Gordon M. Ambach, Commissioner of Education of the State of New York, for and on behalf of the State Education Department, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this 10th day of April, 1979.

/s/ Gordon M. Ambach
Commissioner of Education

DECISION OF IMPARTIAL HEARING
OFFICER TO BOARD OF EDUCATION

STATE OF NEW YORK
HENDRICK HUDSON SCHOOL DISTRICT

In the Matter of the Education

of

AMY ROWLEY

DECISION OF IMPARTIAL
HEARING OFFICER TO
BOARD OF EDUCATION

This is a decision following an Impartial Hearing in a proceeding to review a determination of the Committee on the Handicapped of Hendrick Hudson School District, pursuant to Education Law, Section 200.5. The Impartial Hearing, which the undersigned was appointed to conduct as Hearing Officer, occurred at the Administrative Offices of Hendrick Hudson School District, 61 Trolley Road, Montrose, New York, on December 20, 1978, and commenced approximately at 10:45 A.M. The Hearing terminated at approximately 5:15 P.M. on the same date. The parents of Amy Rowley, Clifford and Nancy Rowley, hereinafter referred to as "petitioners", were represented by Michael A. Chatoff, Esq., and Hendrick Hudson School District, hereinafter referred to as "respondent", was represented by the law firm of Kuntz & Spletzer, P.C., by Raymond G. Kuntz, Jr., Esq. Also, in attendance was Anita Polk, a sign language interpreter, Mary

Sheie, who also acted as sign language interpreter and Jane Raukohl, Administrative Assistant, Westchester County, office for the Handicapped.

The determination sought to be reviewed apparently declined to appoint an interpreter for the deaf to be present, assisting Amy during the hours of her attendance as a first grade student. The determination itself was not introduced into evidence.

Petitioners' witnesses were as follows:

1. Clifford and Nancy Rowley, parents of Amy Rowley.

2. Mary Sheie, a certified teacher of the deaf, certified interpreter for the deaf and a teacher of sign language.

Further in support of petitioners' contentions, Mr. Chatoff submitted eight exhibits which were introduced into evidence by stipulation (Page 8*). Petitioners' Exhibit No. 7, the affidavit of Taras B. Denis was stipulated into evidence with the understanding that the first sentence thereof be deleted from the Record. It should also be noted that Michael A. Chatoff, attorney for the petitioners, as well as the petitioners, Clifford and Nancy Rowley, were deaf and were required to use the services of a sign language interpreter, as well as the services of Mr. Raukohl and Ms. Sheie to assist them in hearing the course of the testimony given at the Hearing.

The following persons testified on behalf of respondent:

1. Joseph Zavarella, Principal of Furnace Woods Elementary School;
2. Susan Williams, a teacher for hearing impaired children at Northern Westchester Putnam County BOCES;
3. Ellen Garzione, a speech and hearing therapist, employed by respondent;
4. Regina Globerman, first grade teacher of Amy Rowley;
5. Barry Binder, school psychologist, employed by respondent; and
6. Marianne Pappas, resource teacher, certified in special education, employed by respondent.

The respondent also introduced eight exhibits. Respondent's Exhibit No. 7, the Individualized Education Program (IEP) for Amy Rowley was admitted over the objections of Mr. Chatoff for the sole purpose of establishing that an IEP was prepared by the respondent, but decision was reserved as to the validity thereof. Similarly, respondent's Exhibit No. 8, consisting of notes and correspondence relating to the IEP of Amy Rowley, were admitted over the objections of Mr. Chatoff. The transcript of proceedings does not indicate that respondent's Exhibit No. 8 was ever received in evidence. Nevertheless, Exhibit No. 8 was actually admitted in evidence with the same reservations as accorded to the IEP. The letter of petitioners' attorney dated January 3, 1978 implies this where it states:

"Nor does the transcript indicate that I objected to the admission into evidence of District Exhibit No. 8 for the same reasons that I objected to District Exhibit No. 7."

The salient issue is whether the District Committee on the handicapped erred in failing to provide a sign language interpreter to assist Amy while academic subjects were being instructed in her classroom. Secondary issues were (1) whether the Individualized Education Program (IEP) was properly developed, and (2) whether the petitioner are entitled to an independent educational evaluation, at District expense, for Amy.

In accordance with the Regulations of the Commissioner of Education, Section 200.5(c)(10), my decision is based solely on the Record of the proceedings. It should be noted at this point that the petitioners' particular requests for relief and the position they have advocated in behalf of their daughter, Amy, are primarily set forth in the Memoranda submitted by their attorney, Mr. Chatoff. Such Memoranda are not ordinarily considered part of the formal Record of Proceedings. Nonetheless, in view of the hearing handicap of the petitioners and their attorney, and in the interests of substantial justice, I deem the Memoranda part of the official Record only insofar as they set forth the claims of the petitioners. However, any factual conclusions will be made solely on the testimony elicited and the exhibits introduced at the Hearing.

The first witness to testify on behalf of petitioners was Mrs. Nancy Rowley, a certified teacher of the deaf and mother of Amy Rowley. Mrs. Rowley testified that upon learing that her daughter, Amy, was deaf, she began training her utilizing the so-called "total communication approach" (Page 18). Mrs. Rowley further stated that she wanted Amy to be taught in the total communication method so that Amy would have the same opportunity as hearing people. The second witness in behalf of petitioners was Mr. Clifford Rowley, a research chemist and father of Amy Rowley. Mr. Rowley also testified that upon learning of Amy's deafness, the total communication method was used to train her. The third and final witness who appeared on behalf of petitioners was Mary Sheie, a certified teacher of the deaf, a certified interpreter for the deaf and a teacher of sign language. Ms. Sheie testified that she favored the use of total communication in the education of deaf children. She indicated that when a child lip reads, he or she cannot understand everything that is spoken. The options available, she stated when all words are not understood, is to place the deaf child in a total communication situation which would include a person interpreter or teacher who is capable of communicating as close to 100% of the information as possible. She indicated that it is more common for a deaf child to nod its head in agreement than to say it does not understand. She also indicated that if an interpreter were used for a deaf child in a classroom setting, the need for a teacher to repeat for that child would be lessened. Ms. Sheie did not observe Amy in a classroom setting.

Petitioners' Exhibit No. 1, a letter from Joel D. Ziev to the District Committee on the Handicapped, in substance indicated that since he had not observed Amy in her school setting that he would be unable to either support or reject the use of an interpreter within the classroom setting.

Petitioner's Exhibit No. 3 was a Memorandum of a suit filed against the Akron Public Schools for the failure of that district to provide an interperter for a deaf child in the school system. The gist of the Memorandum was that in accordance with Federal regulations, the school district must consider the services of an interpreter as a supplemtary service before placing a deaf child in a separate class.

Petitioners' Exhibit No. 4 was an affidavit of Robert R. Davila, Vice President for Pre-College Programs at Gallaudet College, Washington, D.C., and President of the Council on Education of the Deaf. Dr. Davila has an impressive array of credentials and qualifications in the area of education for the deaf (see petitioners' Exhibit No. 5). The substance of Dr. Davila's affidavit is that public education depends almost totally on spoken communication and that a deaf student placed in a public school will be unable to receive the sensory input without the supplementary assistance of an interpreter. Dr. Davila also indicated that a lip reading deaf person would be unable to ascertain all spoken communications; lectures where the teacher turns his back to the class, group discussions,

the use of public address system, and the use of visual media with sound, all leave the deaf student at a disadvantage since lip reading cannot be fully utilized, if at all. He stated that the foregoing problems could be avoided by employing a qualified interpreter. He further indicated that the presence of an interpreter in the classroom would not be disruptive nor would it isolate the deaf child from other members of the class. Interpretive services, he also noted, when properly planned, have implemented and enhanced the communication and comradery and hearing among deaf students and that the interpreter becomes part of the educational process for all the children. He also indicated that an interpreter service provided for deaf students in regular classes has proved effective at the National Technical Institute for the Deaf and California State University at Northridge, and likewise, on the elementary level, in the Margaret S. Sterck School in Newark, Delaware and the San Diego School Districts and Santa Anna School Districts in California.

Petitioners' Exhibit No. 6 is a transcript of an address given by Dr. Richard G. Brill at a communications symposium, Maryland School for the Deaf, on March 13, 1970. The substance of Dr. Brill's speech was that all means should be used to get concepts, ideas, words and expressions into a deaf child's mind so that he will have the necessary tools needed for cognitive thinking. According to Dr. Brill, the so-called total communications method will be able to get more of the concepts, ideas, words and expressions into the deaf child's mind.

Utilizing this method at the California School for the Deaf in Riverside, it has been demonstrated that some three year olds have developed as many as 300 usable concepts manually while the typical number for a child using exclusively oral means is about 20. The substance of Dr. Brill's address is most aptly abbreviated as follows:

> "The important thing is to get information into the child's brain so that he will have it to use. It seems logical, then, to use every channel and every vehicle possible to get information and language into the child so that the teacher will have the opportunity to draw it out again in different forms and, in the educative process, teach the child to think. This means saturation with total communication". (Petitioners' Exhibit No. 6, Page 4).

Petitioners' Exhibit No. 7, affidavit of Taras B. Denis, a Guidance Counselor and Educator at the New York School for the Deaf, supports a classroom interpreter for Amy as the "unmistakable link between her home and her school . . .".

The first witness to testify on behalf of respondent was Mr. Joseph Zavarella, Principal of the Furnace Woods Elementary School where Amy Rowley is in attendance as a first grade student. Mr. Zavarella was first contacted by Amy's mother in the spring of 1976 concerning Amy's placement in a regular classroom setting. After several staff meetings

and discussions with Mrs. Rowley, arrangements for placement of Amy in kindergarten were made. It was understood that an assessment of Amy's needs would be made by observation of her in the classroom. An FM wireless system was ultimately purchased by the district to aid Amy in hearing, which system is still currently in use. Additionally, BOCES sponsored a basic sign language course at the Furnace Woods School which was attended by several staff members at Furnace Woods, including Sue Power, Amy's kindergarten teacher, Regina Globerman, her present teacher, another first grade teacher, the school nurse teacher and Mrs. Garzione, speech therapist.

The school also employed a sign language interpreter for a period of two weeks. The evaluation made of the sign language interpreter was that it was a non-essential service for Amy in the kindergarten setting. It was found that Amy was not paying attention to the interpreter and that on several occasions, the interpreter actually had to physically divert Amy's attention to him. It is to be noted that the interpreter, S.J. Janik, Jr., submitted an evaluation of the interpreter services he provided for Amy in kindgergarten, and he stated they were "not needed at this time". However, he did not rule out the fact they may be needed in the future (respondents' Exhibit No. 3). Mr. Zavarella's final conclusion was that interpreter services were not needed. Mr. Zavarella's observation of Amy in the classroom both formal and informal were made "almost daily".

Upon completion of kindergarten, an evaluation of Amy was made and it was recommended that she be placed in first grade with the continued use of the FM wireless system and placement in Regina Globerman's classroom. This placement was made as the result of conferences between Mr. Zavarella, Mr. and Mrs. Rowley and other unnamed individuals. Additionally, Amy receives one hour of services daily from a teacher of the deaf, Susan Williams, and three sessions per week with Mrs. Garzione, speech therapist.

On cross-examination, Mr. Zavarella revealed that if Amy had failed in the program being applied, a recommendation would be made that an interpreter is necessary. However, since Amy was a successful first grade student, he could not make such a recommendation.

Susan Williams next testified on behalf of the respondent. Mrs. Williams is employed by BOCES Northern Westchester Putnam County, as a teacher for hearing impaired children and is Amy's language tutor. She spends one hour daily with Amy in a supportive capacity: introducing the reading program that Amy will be given in her classroom working with Amy on second grade skills, introducing new vocabularly, writing language, story writing, etc. She also re-enforces the speech therapist's lessons. It was Mrs. Williams' opinion that Amy is doing better than average in her class, noting that Amy teaches other children what she has already grasped. She stated that Amy has a great capacity for learning, is a very eager student and a very happy,

positive child, who will advise when she does not understand something. She further indicated that an interpreter in the classroom would not make a significant difference in Amy's progress and abilities at the present time, and, that the interpreter could be a detriment in Amy's interactions with the teacher and other children in the classroom.

On cross-examination, Mrs. Williams testified that if Amy had been brought up in a total communication environment at home, the placement of Amy in a classroom without an interpreter would not result in a retrogression by Amy in her skills and learning ability. Mrs. Williams indicated that Amy was receiving the great bulk of information that was being presented in the classroom, and, that by drawing her attention away from her classmates and her teacher when Amy is doing very well in every aspect of her school experience, the interpreter would be a detriment. She offered a definition of "total communication" as follows:

> ". . . a person who uses signing and finger spelling and audible speech simultaneously is a person who would be using total communication."

Ellen Garzione, a speech and hearing therapist employed by respondent, testified that she meets with Amy three times a week for a half hour each time teaching language usage, pronunciation and articulation. She testified that Amy is progressing "fantastically well" in articulation and mastery of speech. She testified that she has observed Amy

informally in her classroom, lunchroom and in activities. She stated that an interpreter would be of no assistance to Amy insofar as the services that she provides for Amy, and nor would an interpreter in the classroom setting be of any assistance to Amy inasmuch as Amy is achieving as well as, or better than, the average first graders whom she has observed.

Regina Globerman, Amy's first grade teacher, testified that she communicates and teaches with Amy orally with a lot of demonstration. When something is introduced for the first time, it is gone over with the students step by step with demonstration. Mrs. Globerman also testified that she participated in sign language programs and uses sign language in communicating with Amy. She stated that when Amy first came to he class, she knew all the "readiness skills", knew the letters of the alphabet and their sounds and had a good basic concept of numbers. Initially, Amy could not read, but is now a capable reader, teaching others in the class. Amy has learned addition and subtraction. Mrs. Globerman also uses the FM wireless system as a supplementary devise to communicate with Amy, but this is not used all of the time. Amy presently ranks at the "top" in the middle group of the class, often assisting other children. It was Mrs. Globerman's opinion that a sign language interpreter would not be of any benefit to Amy because she is very teacher oriented.

On cross-examination, Mrs. Globerman indicated that this is her first exper-

ience with the education of a handicapped deaf child. She also indicated that she did not know if an interpreter would be necessary for Amy in the future. On re-direct examination, Mrs. Globerman indicated that neither Mr. or Mrs. Rowley came to observe Amy as a student in her classroom. She also testified that Mrs. Rowley had offered her material to aid her in the preparation of the Individualized Education Plan for Amy. Mrs. Globerman's earlier testimony indicated that a meeting in early December of 1978, a meeting was called to develop the IEP for Amy and that the IEP was merely read to Mr. and Mrs. Rowley. However, on re-direct, she indicated that Mr. Rowley had requested certain additions be placed in the IEP which were included in the final statement.

Mr. Zavarella was next recalled. He testified that a meeting was conducted on December 6, 1978 at the Furnace Woods Elementary School, which was attended by the petitioners, Mr. and Mrs. Rowley with an interpreter, Robin Reed, Mrs. Globerman, Mrs. Garzione, Mrs. Williams, Ms. Kausner, school psychologist, Mrs. Roberts, school nurse teacher and himself. The purpose of the meeting was to provide an opportunity for the parents to present their "input" on the IEP being developed for Amy. Mr. Zavarella indicated that there were extensive conversations with respect to the objectives to be reached and met for Amy in the first grade program. On re-cross-examination, Mr. Zavarella indicated that when the petitioners failed to approve the IEP because of the failure to include a sign language interpreter, the matter was

referred to the District Committee on the Handicapped.

Next to testify on behalf of the respondent was Barry Binder, school psychologist and a member of the District Committee on the Handicapped. Mr. Binder indicated that the Committee on the Handicapped heard testimony as to Amy's functioning in her classroom and assigned members to observe Amy in her classroom and also to observe alternative placements which might be necessary. The Committee on the Handicapped also explored a class for the deaf operated by BOCES in the Yorktown School system and also assigned Mrs. Pappas, another member of the Committee on the Handicapped, to observe Amy in the classroom. Mr. Binder indicated that Mr. and Mrs. Rowley attended all of the meetings of the Committee on the Handicapped and the final decision of the Committee on the Handicapped was ultimately conveyed to them.

Marianne Pappas, a resource teacher, certified in special education, employed by respondent, and a member of the District Committee on the Handicapped, testified she observed Amy in the classroom for one morning. Based on her observations, Mrs. Pappas found Amy to be very alert to the teacher and to other children -- a child with good work habits and skills, whose social and academic interactions are excellent. She further indicated that an interpreter would add nothing of value to Amy's educational progress or to her academic skills.

The final witness to testify was Mr. Clifford Rowley, who was recalled by Mr. Chatoff. On recall, Mr. Rowley indicated that two members of the Board of Education were concerned "about the money of hiring an interpreter". On examination by me, Mr. Rowley indicated that he first learned that Amy was deaf when she was two years old, and that with the assistance of hearing aids, Amy can hear "around 50%". When Mr. Rowley uses sign language with her, she understands 75% to 90% of the communication.

DECISION AND RECOMMENDATION

The written recommendation of the Committee on the Handicapped regarding Amy Rowley was never introduced into evidence by either party. During the course of testimony, references to it were made by Mr. Binder (Page 134) and by Mr. Chatoff (Page 153), and additionally, further references were made in the individual Memoranda submitted by opposing counsel. All of the references to the recommendation of the Committee on the Handicapped went uncontradicted, and accordingly, not having the same as part of the Record before me, I find that the Committee on the Handicapped recommended:

1. That Amy Rowley remain at the Furnace Woods School;

2. That she be provided the service of a certified teacher of the deaf for one hour daily;

3. That she receive the services of a speech therapist three times weekly; and

4. That she receive a formal written evaluation yearly.

The first issue to be decided is whether the petitioners are entitled to an independent educational evaluation of Amy at District expense. There is nothing in the Record to show that such an independent educational evaluation for Amy had ever been requested by the petitioners, let alone whether one had been denied by respondent. The only reference in the Record before me for an independent educational evaluation of Amy is contained in the opening statement of Mr. Chatoff (page 6), which is not evidence. Hence, it is my determination that the petitioners are not entitled to an independent educational evaluation of Amy.

The issue as to whether the Individualized Education Program for Amy was properly made and adopted poses more difficulty. The Regulations of the Commissioner of Education, Section 200.4 (f) state that the Individualized Education Program ". . . shall be a written statement to meet the unique needs of each handicapped pupil, which shall be developed in a planning conference. An individualized education program shall be prepared at the time the child enters the special education program, and shall be reviewed and, if appropriate, revised periodically, but not less than annually". Section 200.4(f)(2)(i) requires the

". . . conference for each new handicapped pupil shall be conducted as soon as possible, but no later than 30 days, after the child enters the special education program." The section further provides that the participants at the planning conference shall include the pupil's teacher, the pupil, whenever appropriate, the parents or legal guardian, a representative of the school district, other than the child's teacher, who is qualified to provide or supervise the provision of special education, or other individuals at the discretion of the parent or agency. It is also provided that notice of the planning conference be given to the parent or guardian.

The testimony of Regina Globerman, Amy's first grade teacher, first indicated that when she prepared the IEP for Amy she did not meet with the petitioners nor did she have any conferences with the petitioners with reference to same. She also initially indicated that a meeting was just to present to the petitioners what had been formulated as an educational program for Amy (Pages 101-103). On redirect examination, however, Mrs. Globerman testified that in preparing the initial draft of the IEP Mrs. Rowley knew that she was preparing the IEP and had even offered her a book on how to prepare an IEP. Mrs. Globerman further testified that a meeting was held on December 6, 1978, at which Mr. Rowley requested that certain additions be made to the IEP and that the same were included in the final draft of the IEP (respondent's Exhibit No. 7) (Pages 112-114). Mr. Zavarella then testified that a meeting was conducted on December 6, 1978 which was

attended by petitioners with an interpreter, Robin Reed, Mrs. Globerman, Mrs. Garzione, Mrs. Williams, Ms. Kausner, school psychologist, Mrs. Roberts, school nurse, and himself. Mr. Zavarella indicated the purpose of the meeting was to provide an opportunity for the parents to present their "input" on the IEP being developed for Amy (Pages 119-121).

It is my finding that the Individualized Education Program for Amy was properly made, although not within the time frame mandated by the Regulations of the Commissioner of Education. Section 200.4 does require a planning conference to develop the individualized education program, which conference is to include the parents of the handicapped pupil. This section does not indicate that the parents of the handicapped pupil must consent to the contents of the IEP or that the parents have the right of approval or disapproval of same. The uncontradicted testimony is that, in fact, a planning conference was held on December 6, 1978, which conference was attended by the petitioners herein, Amy's teacher, the Principal of the school, and several other staff members. The uncontradicted testimony also indicates that the petitioners had an opportunity to be heard and that some of their recommendations were inserted into the final IEP draft for Amy. It further appears that Amy was declared a handicapped child by the Committee on the Handicapped at a September, 1978 meeting and that in October, 1978, the Committee recommended placement in a regular first grade classroom with the supplementary services set forth above.

At a December 11, 1978 meeting of the Committee on the Handicapped, the petitioners presented an affidavit by Robert R. Davila of Galludet College. However, it appears the Committee only changed its original determination to the extent that a written evaluation of Amy be conducted yearly. The Commissioners Regulations require that the IEP be prepared at the time the child enters the special education program. (Commissioners Regulations, Section 200.4(f)). Accordingly, although I find the District has not strictly complied with the time requirements set forth in the Commissioners Regulations, I do find that the other procedures followed by the District to be in substantial compliance with the Regulations. Since there is no sanction for an untimely prepared IEP, I further find that the District's IEP shall be upheld.

Therefore, respondent's Exhibit No. 7 (The IEP) is admitted into evidence for all purposes and Exhibit No. 8 is admitted into evidence as proof of substantial compliance with the legal requirements set forth in the Commissioners Regulations.

The core issue of whether the Committee on the Handicapped erred in failing to provide a sign language interpreter to assist Amy while academic subjects were being instructed in her classroom is decided in favor of the respondent. It is my decision that on the Record before me, the petitioners have failed to establish by substantial evidence that a sign language interpreter

is presently needed by Amy in the classroom setting while academic subjects are being taught. The basic contention of the petitioners is that the best way to impart information into a deaf person's mind is through the use of "total communication". Total communication was defined as the use of signing, finger spelling and audible speech simultaneously, a definition apparently adopted by petitioners' attorney (Page 82). The total communications with her and they wish the total communication method to be continued in her school setting. To provide total communication in the school setting would require the services of a sign language interpreter. It is petitioners' basic contention that unless Amy is provided with the services of a sign language interpreter in the academic setting, she will be at a substantial disadvantage as compared to the other pupils who have normal hearing.

The affidavit of Robert R. Davila (petitioners' Exhibit No. 4) supported as a general concept the use of total communication is the education of deaf persons as did the transcript of the speech given by Dr. Richard G. Brill (petitioners' Exhibit No. 6). The affidavit of Taras B. Denis (petitioners' Exhibit No. 7) supported the use of a sign language interpreter for Amy in the classroom setting.

Dr. Davila's affidavit, while very erudite and informative, merely supports the use of total communication as a general concept. There is no indication that Dr. Davila has ever met Amy, observed her in a classroom setting, reviewed her records or tested her for

academic achievement. Likewise the transcript of Dr. Brill's speech, which incidentially, was made on March 13, 1970, could in no way relate to Amy except for the use of total communication as a general concept. The substance of Dr. Brill's address is that information must be imparted into the child's brain and that every channel and vehicle must be utilized to get the information there. However, no evidence whatsoever was introduced at the hearing which would indicate that Amy is not receiving the necessary information or that she is not progressing educationally and academically. In fact, the overwhelming and uncontradicted evidence is to the contrary.

Similarly, the affidavit of Taras B. Denis, while supporting the concept of an interpreter for Amy in the classroom, does not indicate the basis for such need. Mr. Denis does not indicate that he has ever observed Amy in the classroom setting nor does he indicate that Amy is not progressing academically, educationally, or socially. Accord ingly, while the above documents are supportive of the general concept of a sign language interpreter and are hence relevant, they do not provide any substantial evidence applicable to the particular educational development of Amy Rowley, and are accorded little weight.

The testimony of the petitioners, Clifford and Nancy Rowley, was very short and merely indicated that they utilized the total communication method in communicating with their daughter, Amy, and

wished the same to be carried through in the school setting. Neither Mr. nor Mrs. Rowley have ever observed Amy in the present classroom setting, nor did they allege that she was not progressing educationally, academically or socially. Mrs. Sheie, who also testified on behalf of petitioners, stated that she favored the use of total communication in the education of deaf children, however, she testified that she has not observed Amy in a classroom setting. There is no evidence that Mrs. Sheie had tested Amy as to her academic or social achievement nor did she indicate that Amy was deficient in any of these areas.

The witnesses who testified on behalf of respondent clearly indicated that Amy was achieving educationally, academically, and socially. Regina Globerman, Amy's first grade teacher, stated that Amy was achieving academically, having learned addition, subtraction and reading, and, is in fact, capable of aiding other pupils in the class. Mrs. Globerman indicated that Amy ranks at the "top" in the middle group of her class. Susan Williams, Amy's language tutor, noted that Amy was doing better than average in her class and also stated that Amy is able to assist other pupils in what she has already grasped. She also stated that Amy has a great capacity for learning and that Amy was receiving the great bulk of information that was being presented in the classroom. Ellen Garzione, Amy's speech and hearing therapist, stated that Amy was achieving as well as, or better than the average first grader she has observed. Marianne Pappas, a

resource teacher and a member of the District Committee on the Handicapped, and who observed Amy for one morning in the classroom stated that Amy had good work habits and skills and that her social and academic interactions are excellent. Regina Globerman, Susan Williams, Ellen Garzione and Marianne Pappas all unequivocally stated that a sign language interpreter was not needed for Amy in the classroom setting. Additionally, Joseph Zavarella, the Principal in Amy's school, who observed her almost daily, indicated the same. Both Regina Globerman and Joseph Zavarella indicated that if Amy was not achieving in the program currently being given to her, a recommendation would be made for a sign language interpreter. The testimony of the respondent's witnesses regarding Amy's academic and social progress went wholly uncontradicted. It is further to be noted that Amy does have some hearing ability when using hearing devices.

The Commissioner of Education of the State of New York has repeatedly held that a school district is obligated to provide its handicapped students with an adequate program, suitable to the individual student's educational needs. The district need not match or surpass a program offered by a private or special school. The petitioners herein have not addressed the appropriateness, suitability or adequacy of the education program arranged for Amy. The thrust of the evidence submitted by pettitioners is that total communication, i.e. sign language interpreter, be continued in the classroom setting. The petitioners

have not submitted any evidence to show that the present program is inappropriate, inadequate or unsuitable, while respondent has established that Amy is achieving academically and socially. Accordingly, I find that the program arranged for Amy Rowley as stated above is appropriate and determine that the same shall be continued through the remainder of the present school year. (See Matter of Charles J. McLester, Jr., Commissioners Decision #9287, 16 Ed. Dept. Rep. 29 and Appeal of Donald and Mary M, Commissioners Decision #9383, 16 Ed. Dept. Rep. 255.)

PLEASE TAKE NOTICE, that the petitioners, Clifford and Nancy Rowley, and the respondent, Hendrick Hudson School District, have a right to obtain a review of this decision by the Commissioner of Education of the State of New York in accordance with the provisions of Education Law of the State of New York Section 4404 and Public Law, 94-142.

Dated: January 12, 1979.

/s/ Albert P. Roberts
ALBERT P. ROBERTS
Hearing Officer
11 Market Street
Poughkeepsie, New York

12601

TO: CLIFFORD AND NANCY ROWLEY
Petitioners
1496 Washington Street
Peekskill, New York 10566

MICHAEL A. CHATOFF, ESQ.
Attorney for Petitioners
92-05 Radnor Road
Jamaica, New York 11423

KUNTZ, LEWIS & SPLETZER, P.C.
Attorneys for Hendrick Hudson
School District
21 Davis Avenue - P. O. Box 3330
Poughkeepsie, New York 12603

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 17th day of July, one thousand nine hundred and eighty.

PRESENT: HON. WALTER R. MANSFIELD

HON. WILLIAM H. TIMBERS
Circuit Judges

HON. DUDLEY B. BONSAL
District Judge

MAY ROWLEY, by her parents and natural guardians, CLIFFORD and NANCY ROWLEY, and CLIFFORD and NANCY ROWLEY, in their own right,

Plaintiffs-Appellees,

v.

THE BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, WESTCHESTER COUNTY, and THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Defendants-Appellants.

80-7098

Stamped as Filed in the
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
JULY 17, 1980
A. DANIEL FUSARO, Clerk

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellants.

A. DANIEL FUSARO,
Clerk

/s/ By: Arthur Heller,
Deputy Clerk

Seal of the
UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 17th day of September, one thousand nine hundred and eighty.

PRESENT: HON. WALTER R. MANSFIELD

HON. WILLIAM H. TIMBERS
Circuit Judge

HON. DUDLEY B. BONSAL
District Judge

Circuit Judges.

AMY ROWLEY, by her parents and natural guardians, Clifford and Nancy Rowley, in their own right,

Plaintiff-Appellee,

v.

THE BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, Westchester County, State of New York and THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Defendants-Appellants.

80-7098

A petition for a rehearing having been filed herein by counsel for the

appellant the Board of Education of the Hendrick Hudson Central School District,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

/s/ A. Daniel Fusaro
A. DANIEL FUSARO, Clerk

Filed September 17, 1980

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 17th day of September, one thousand nine hundred and eighty

---

AMY ROWLEY, by her parents and natural guardians, CLIFFORD and NANCY ROWLEY, and CLIFFORD and NANCY ROWLEY, in their own right,

Plaintiffs-Appellees,

v.

THE BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, WESTCHESTER COUNTY, and THE COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Defendants-Appellees.

80-7098

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant The Board of Education of the Hendrick Hudson Central School District, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

Filed Sept. 17,1980. /s/
Chief Judge

EDUCATION OF THE HANDICAPPED
20 U.S.C. 1401-1461

SUBCHAPTER I - GENERAL PROVISIONS

1401. Definitions

As used in this chapter -

(1) The term "handicapped children" means mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health impaired children, or children with specific learning disabilities, who by reason thereof require special education and related services.

(2) The term "Commissioner" means the Commissioner of Education.

(3) The term "Advisory Committee" means the National Advisory Committee on Handicapped Children.

(4) The term "construction", except where otherwise specified, means (A) erection of new or expansion of existing structures, and the acquisition and installation of equipment therefor; or (B) acquisition of existing structures not owned by any agency or institution making application for assistance under this chapter; or (C) remodeling or alteration (including the acquisition, installation, modernization, or replacement of equipment) of existing structures; or (D) acquisition of land in connection with the activities in clauses (A), (B), and

(C); or (E) a combination of any two or more of the foregoing.

(5) The term "equipment" includes machinery, utilities, and built-in equipment and any necessary enclosures or structures to house them, and includes all other items necessary for the functioning of a particular facility as a facility for the provision of educational services, including items such as instructional equipment and necessary furniture, printed, published, and audio-visual instructional materials, tele-communications, sensory, and other technological aids and devices, and books, periodicals, documents, and other related materials.

(6) The term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands and the Trust Territory of the Pacific Islands.

(7) The term "State educational agency" means the State board of education or other agency or officer primarily responsible for the State supervision of public elementary and secondary schools, or, if there is no such officer or agency, an officer or agency designated by the Governor or by State law.

(8) The term "local educational agency" means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary or secondary schools

in a city, county, township, school district, or other political subdivision of a State, or such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools. Such term also includes any other public institution or agency having administrative control and direction of a public elementary or secondary school.

(9) The term "elementary school" means a day or residential school which provides elementary education, as determined under State law.

(10) The term "secondary school" means a day or residential school which provides secondary education, as determined under State law, except that it does not include any education provided beyond grade 12.

(11) The term "institution of higher education" means an educational institution in any State which -

(A) admits as regular students only individuals having a certificate of graduation from a high school, or the recognized equivalent of such a certificate;

(B) is legally authorized within such State to provide a program of education beyond high school;

(C) provides an educational program for which it awards a bachelor's degree, or provides not less than a two-year program which is acceptable for

full credit toward such a degree, or offers a two-year program in engineering, mathematics, or the physical or biological sciences which is designated to prepare the student to work as a technician and at a semiprofessional level in engineering, scientific, or other technological fields which require the understanding and application of basic engineering, scientific, or mathematical principles or knowledge;

(D) is a public or other nonprofit institution; and

(E) is accredited by a nationally recognized accrediting agency or association listed by the Commissioner pursuant to this paragraph or, if not so accredited, is an institution whose credits are accepted, on transfer, by not less than three institutions which are so accredited, for credit on the same basis as if transferred from an institution so accredited: Provided, however, That in the case of an institution offering a two-year program in engineering, mathematics, or the physical or biological sciences which is designed to prepare the student to work as a technician and at a semiprofessional level in engineering, scientific, or technological fields which require the understanding and application of basic engineering, scientific, or mathematical principles or knowledge, if the Commissioner determines that there is no nationally recognized accrediting agency or association qualified to accredit such institutions, he shall appoint an advisory committee, composed of persons specially qualified to evaluate training

provided by such institutions, which shall prescribe the standards of content, scope, and quality which must be met in order to qualify such institutions to participate under this Act and shall also determine whether particular institutions meet such standards. For the purposes of this paragraph the Commissioner shall publish a list of nationally recognized accrediting agencies or associations which he determines to be reliable authority as to the quality of education of training offered.

(12) The term "nonprofit" as applied to a school, agency, organization or institution means a school, agency, organization, or institution owned and operated by one or more nonprofit corporations or associations no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual.

(13) The term "research and related purposes" means research, research training (including the payment of stipends and allowances), surveys, or demonstrations in the field of education of handicapped children, or the dissemination of information derived therefrom, including (but without limitation) experimental schools.

(14) The term "Secretary" means the Secretary of Health, Education and Welfare.

(15) The term "children with specific learning disabilities" means those children who have a disorder in one or more of the basic psychological processes involved in understanding or in using language,

spoken or written, which disorder may manifest itself in imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. Such disorders include such conditions as perceptual handicaps, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. Such term does not include children who have learning problems which are primarily the result of visual, hearing, or motor handicaps, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

(16) The term "special education" means specifically designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.

(17) The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and includes the early identification and assessment of handicapping conditions in children.

(18) The term "free appropriate public education" means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

(19) The term "individualized education program" means a written statement for each handicapped child developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of handicapped children, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include (A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are bing achieved.

(20) The term "excess costs" means those costs which are in excess of the average annual per student expenditure in a local educational agency during the preceding school year for an elementary or secondary school student, as may be appropriate, and which shall be computed after deducting (A) amounts received under this subchapter or under title I or title VII of the Elementary or Secondary Education Act of 1965, and (B) any State or local funds expended for programs which would qualify for assistance under this subchapter or under such titles.

(21) The term "native language" has the meaning given that term by section 703(a)(2) of the Bilingual Education Act.

(22) The term "intermediate educational unit" means any public authority, other than a local educational agency, which is under the general supervision of a State educational agency, which is established by State law for the purpose of providing free public education on a regional basis, and which provides special education and related services to handicapped children within that State.

1402. Bureau for education and training of handicapped; Deputy Commissioner: appointment and compensation; Associate Deputy Commissioner and other assistants to Deputy Commissioner.

(a) There shall be, within the Office of Education, a bureau for the education and training of the handicapped which shall be the principal agency in the

Office of Education for administering and carrying out programs and projects relating to the education and training of the handicapped, including programs and projects for the training of teachers of the handicapped and for research in such education and training.

(b)(1) The Bureau established under subsection (a) of this section shall be headed by a Deputy Commissioner of Education who shall be appointed by the Commissioner, who shall report directly to the Commissioner, be compensated at the rate specified for, and placed in, grade 18 of the General Schedule set forth in section 5332 of Title 5.

(2) In addition to such Deputy Commissioner, there shall be placed in such Bureau five positions for persons to assist the Deputy Commissioner in carrying out his duties, including the position of Associate Deputy Commissioner, and such positions shall be placed in grade 16 of the General Schedule set forth in section 5332 of Title 5.

1403. National Advisory Committee on Handicapped Children

Establishment; membership

(a) The Commissioner shall establish in the Office of Education a National Advisory Committee on Handicapped Children, consisting of fifteen members, appointed by the Commissioner. At least eight of such members shall be persons affiliated with educational, training, or research programs for the handicapped.

Functions of Committee; recommendations; report to Congress; termination of Committee

(b) The Advisory Committee shall review the administration and operation of the programs authorized by this chapter and other provisions of law administered by the Commissioner with respect to handicapped children, including their effect in improving the educational attainment of such children, and make recommendations for the improvement of such administration and operation with respect to such children. Such recommendations shall take into consideration experience gained under this and other Federal programs for handicapped children and, to the extent appropriate, experience gained under other public and private programs for handicapped children. The Advisory Committee shall from time to time make such recommendations as it may deem appropriate to the Commissioner and shall make an annual report of its findings and recommendations to the Commissioner not later than June 30 of each year. The Commissioner shall transmit each such report to the Secretary together with his comments and recommendations, and the Secretary shall transmit such report, comments, and recommendations to the Congress together with any comments or recommendations he may have with respect thereto. The Advisory Committee shall continue to exist until October 1, 1977.

Authorization of Appropriations

(c) There are authorized to be appropriated for the purposes of this

section $100,000 for the fiscal year ending June 30, 1974, and for each of the three succeeding fiscal year.

1404. Acquisition of equipment and construction of necessary facilities

Authorization for use of funds

(a) In the case of any program authorized by this chapter, if the Commissioner determines that such program will be improved by permitting the funds authorized for such program to be used for the acquisition of equipment and the construction of necessary facilities, he may authorize the use of such funds for such purposes.

Recovery of payments under certain conditions

(b) If within twenty years after the completion of any construction (except minor remodeling or alteration) for which funds have been paid pursuant to a grant or contract under this chapter the facility constructed ceases to be used for the purposes for which it was constructed, the United States, unless the Secretary determines that there is good cause for releasing the recipient of the funds from its obligation, shall be entitled to recover from the applicant or other owner of the facility an amount which bears the same ratio to the then value of the facility as the amount of such Federal funds bore to the cost of the portion of the facility financed with such funds. Such value shall be determined by agreement of the parties or by action brought in the United States

district court for the district in which the facility is situated.

1405. Employment of handicapped individuals

The Secretary shall assure that each recipient of assistance under this chapter shall make positive efforts to employ and advance in employment qualified handicapped individuals in programs assisted under this chapter.

1406. Grants for removal of architectural barriers; authorization of appropriations

(a) Upon application by any State or local educational agency or intermediate unit the Commissioner is authorized to make grants to pay part or all of the cost of altering existing buildings and equipment in the same manner and to the same extent as authorized by the Act approved August 12, 1968 (Public Law 90-480), relating to architectural barriers.

(b) For the purpose of carrying out the provisions of this section, there are authorized to be appropriated such sums as may be necessary.

* * *

1412. Eligibility requirements

In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Commissioner that the following conditions are met:

(1) The State has in effect a policy that assures all handicapped children the right to a free appropriate public education.

(2) The State has developed a plan pursuant to section 1413(b) of this title in effect prior to November 29, 1975, and submitted not later than August 21, 1975, which will be amended so as to comply with the provisions of this paragraph. Each such amended plan shall set forth in detail the policies and procedures which the State will undertake or has undertaken in order to assure that --

(A) there is established (i) a goal of providing full educational opportunity to all handicapped children, (ii) a detailed timetable for accomplishing such a goal, and (iii) a description of the kind and number of facilities, personnel, and services necessary throughout the State to meet such a goal;

(B) a free appropriate public education will be available for all handicapped children between the ages of three and eighteen within the State not later than September 1, 1978, and for all handicapped children between the ages of

three and twenty-one within the State not later than September 1, 1980, except that, with respect to handicapped children aged three to five and aged eighteen to twenty-one, inclusive, the requirements of this clause shall not be applied in any State if the application of such requirements would be inconsistent with State law or practice, or the order of any court, respecting public education within such age groups in the State;

(C) all children residing in the State who are handicapped, regardless of the severity of their handicap, and who are in need of special education and related services are identified, located, and evaluated, and that a practical method is developed and implemented to determine which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services;

(D) policies and procedures are established in accordance with detailed criteria prescribed under section 1417(c) of this title; and

(E) the amendment to the plan submitted by the State required by this section shall be available to parents, guardians, and other members of the general public at least thirty days prior to the date of submission of the amendment to the Commissioner.

(3) The State has established priorities for providing a free appropriate public education to all handicapped children, which priorities shall meet the

timetables set forth in clause (B) of paragraph (2) of this section, first with respect to handicapped children who are not receiving an education, and second with respect to handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education, and has made adequate progress in meeting the timetables set forth in clause (B) of paragraph (2) of this section.

(4) Each local educational agency in the State will maintain records of the individualized education program for each handicapped child, and such program shall be established, reviewed, and revised as provided in section 1414(a)(5) of this title.

(5) The State has established (A) procedural safeguards as required by section 1415 of this title, (B) procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily, and (C) procedures to assure that testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of handicapped children will be selected and adminis-

tered so as not to be racially or culturally discriminatory. Such materials or procedures shall be provided and administered in the child's native language or mode of communication, unless it clearly is not feasible to do so, and no single procedure shall be the sole criterion for determining an appropriate educational program for a child.

(6) The State educational agency shall be responsible for assuring that the requirements of this subchapter are carried out and that all educational programs for handicapped children within the State, including all such programs administered by any other State or local agency, will be under the general supervision of the persons responsible for educational programs for handicapped children in the State educational agency and shall meet education standards of the State educational agency.

(7) The State shall assure that (A) in carrying out the requirements of this section procedures are established for consultation with individuals involved in or concerned with the education of handicapped children, including handicapped individuals and parents or guardians of handicapped children, and (B) there are public hearings, adequate notice of such hearings, and an opportunity for comment available to the general public prior to adoption of the policies, programs and procedures required pursuant to the provisions of this section and section 1413 of this title.

1413. State plans

Requisite features

(a) Any State meeting the eligibility requirements set forth in section 1412 of this title and desiring to participate in the program under this subchapter shall submit to the Commissioner, through its State educational agency, a State plan at such time, in such manner, and containing or accompanied by such information, as he deems necessary. Each such plan shall --

(1) set forth policies and procedures designed to assure that funds paid to the State under this subchapter will be expended in accordance with the provisions of this subchapter, with particular attention given to the provisions of sections 1411(b), 1411(c), 1411(d), 1412 (2), and 1412(3) of this title;

(2) provide that programs and procedures will be established to assure that funds received by the State or any of its political subdivisions under any other Federal program, including section 241c-1 of this title, section 844a(b)(8) of this title or its successor authority, and section 1262(a)(4)(B) of this title, under which there is specific authority for the provision of assistance for the education of handicapped children, will be utilized by the State, or any of its political subdivisions, only in a manner consistent with the goal of providing a free appropriate public education for all handicapped children, except that nothing in this clause shall be construed to limit the specific requirements of the laws governing such Federal programs;

(3) set forth, consistent with the purposes of this chapter, a description of programs and procedures for (A) the development and implementation of a comprehensive system of personnel development which shall include the in-service training of general and special educational instructional and support personnel necessary to carry out the purposes of this chapter are appropriately and adequately prepared and trained, and effective procedures for acquiring and disseminating to teachers and administrators of programs for handicapped children significant information derived from educational research, demonstration, and similar projects, and (B) adopting, where appropriate, promising educational practices and materials development through such projects;

(4) set forth policies and procedures to assure --

(A) that, to the extent consistent with the number and location of handicapped children in the State who are enrolled in private elementary and secondary schools, provision is made for the participation of such children in the program assisted or carried out under this subchapter by providing for such children special education and related services; and

(B) that (i) handicapped children in private schools and facilities will be provided special education and related services (in conformance with an individualized educational program as required by this subchapter) at no cost to their parents or guardian, if such children are

placed or referred to such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this subchapter or any other applicable law requiring the provision of special education and related services to all handicapped children within such State, and (ii) in all such instances the State educational agency shall determine whether such schools and facilities meet standards that apply to State and local educational agencies and that children so served have all the rights they would have if served by such agencies;

(5) set forth policies and procedures which assure that the State shall seek to recover any funds made available under this subchapter for services to any child who is determined to be erroneously classified as eligible to be counted under section 1411(a) or 1411(d) of this title;

(6) provide satisfactory assurance that the control of funds provided under this subchapter, and title to property derived therefrom, shall be in a public agency for the uses and purposes provided in this subchapter, and that a public agency will administer such funds and property;

(7) provide for (A) making such reports in such form and containing such information as the Commissioner may require to carry out his functions under this subchapter, and (B) keeping such records and affording such access thereto as the Commissioner may find necessary to assure the correctness and verification

of such reports and proper disbursement of Federal funds under this subchapter;

(8) provide procedures to assure that final action with respect to any application submitted by a local educational agency or an intermediate educational unit shall not be taken without first affording the local educational agency or intermediate educational unit involved reasonable notice and opportunity for a hearing;

(9) provide satisfactory assurance that Federal funds made available under this subchapter (A) will not be commingled with State funds, and (B) will be so used as to supplement and increase the level of State and local funds expended for the education of handicapped children and in no case to supplant such State and local funds, except that, where the State provides clear and convincing evidence that all handicapped children have available to them a free appropriate public education, the Commissioner may waive in part the requirement of this clause if he concurs with the evidence provided by the State;

(10) provide consistent with procedures prescribed pursuant to section 1417 (a)(2) of this title, satisfactory assurance that such fiscal control and fund accounting procedures will be adopted as may be necessary to assure proper disbursement of, and accounting for, Federal funds paid under this subchapter to the State, including any such funds paid by the State to local educational agencies and intermediate educational units;

(11) provide for procedures for evaluation at least annually of the effectiveness of programs in meeting the educational needs of handicapped children (including evaluation of individualized education programs), in accordance with such criteria that the Commissioner shall prescribe pursuant to section 1417 of this title; and

(12) provide that the State has an advisory panel, appointed by the Governor or any other official authorized under State law to make such appointments, composed of individuals involved in or concerned with the education of handicapped children, including handicapped individuals, teachers, parents or guardians of handicapped children, State and local education officials, and administrators of programs for handicapped children, which (A) advises the State educational agency of unmet needs within the State in the education of handicapped children, (B) comments publicly on any rules or regulations proposed for issuance by the State regarding the education of handicapped children and the procedures for distribution of funds under this subchapter, and (C) assists the State in developing and reporting such data and evaluations as may assist the Commissioner in the performance of his responsibilities under section 1418 of this title.

Additional assurances

(b) Whenever a State educational agency provides free appropriate public education for handicapped children, such State educational agency shall include,

as part of the State plan required by subsection (a) of this section, such additional assurances not specified in such subsection (a) of this section as are contained in section 1414(a) of this title, except that funds available for the provision of such education or services may be expended without regard to the provisions relating to excess costs in section 1414(a) of this title.

Notice and hearing prior to disapproval of plan

(c) The Commissioner shall approve any State plan and any modification thereof which --

(1) is submitted by a State eligible in accordance with section 1412 of this title; and

(2) meets the requirements of subsection (a) and subsection (b) of this section.

The Commissioner shall disapprove any State plan which does not meet the requirements of the preceding sentence, but shall not finally disapprove a State plan except after reasonable notice and opportunity for a hearing to the State.

1414. Application

Requisite features

(a) A local educational agency or an intermediate educational unit which desires to receive payments under section 1411(d) of this title for any fiscal year

shall submit an application to the appropriate State educational agency. Such application shall --

(1) provide satisfactory assurance that payments under this subchapter will be used for excess costs directly attributable to programs which --

(A) provide that all children residing within the jurisdiction of the local educational agency or the intermediate educational unit who are handicapped, regardless of the severity of their handicap, and are in need of special education and related services will be identified, located, and evaluated, and provide for the inclusion of a practical method of determining which children are currently receiving needed special education and related services and which children are not currently receiving such education and services;

(B) establish policies and procedures in accordance with detailed criteria prescribed under section 1417(c) of this title;

(C) establish a goal of providing full educational opportunities to all handicapped children, including --

(i) procedures for the implementation and use of the comprehensive system of personnel development established by the State educational agency under section 1413(a)(3) of this title;

(ii) the provision of, and the establishment of priorities for providing,

a free appropriate public education to all handicapped children, first with respect to handicapped children who are not receiving an education, and second with respect to handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education;

(iii) the participation and consultation of the parents or guardian of such children; and

(iv) to the maximum extent practicable and consistent with the provisions of sectin 1412(5)(B) of this title, the provision of special services to enable such children to participate in regular educational programs;

(D) establish a detailed timetable for accomplishing the goal described in subclause (C); and

(E) provide a description of the kind and number of facilities, personnel, and services necessary to meet the goal described in subclause (C);

(2) provide satisfactory assurance that (A) the control of funds provided under this subchapter, and title to property derived from such funds, shall be in a public agency for the uses and purposes provided in this subchapter, and that a public agency will administer such funds and property, (B) Federal funds expended by local educational agencies and intermediate educational units for programs under this subchapter (i) shall be used to pay only the excess costs directly

attributable to the education of handicapped children, and (ii) shall be used to supplement and, to the extent practicable, increase the level of State and local funds expended for the education of handicapped children, and in no case to supplant such State and local funds, and (C) State and local funds will be used in the jurisdiction of the local educational agency or intermediate educational unit to provide services in program areas which, taken as a whole, are at least comparable to services being provided in areas of such jurisdiction which are not receiving funds under this subchapter;

(3)(A) provide for furnishing such information (which, in the case of reports relating to performance, is in accordance with specific performance criteria related to program objectives), as may be necessary to enable the State educational agency to perform its duties under this subchapter, including information relating to the educational achievement of handicapped children participating in programs carried out under this subchapter; and

(B) provide for keeping such records, and provide for affording such access to such records, as the State educational agency may find necessary to assure the correctness and verification of such information furnished under subclause (A);

(4) provide for making the application and all pertinent documents related to such application available to parents,

guardians, and other members of the general public, and provide that all evaluations and reports required under clause (3) shall be public information;

(5) provide assurances that the local educational agency or intermediate educational unit will establish, or revise, whichever is appropriate, an individualized education program for each handicapped child at the beginning of each school year and will then review and, if appropriate revise, its provisions periodically, but not less than annually;

(6) provide satisfactory assurance that policies and programs established and administered by the local educational agency or intermediate educational unit shall be consistent with the provisions of paragraph (1) through paragraph (7) of section 1412 and section 1413(a) of this title; and

(7) provide satisfactory assurance that the local educational agency or intermediate educational unit will establish and maintain procedural safeguards in accordance with the provisions of sections 1412(5)(B), 1412(5)(C), and 1415 of this title.

Approval by State educational agencies of applications submitted by local educational agencies or intermediate educational units; notice and hearing

(b)(1) A State educational agency shall approve any application submitted by a local educational agency or an in-

termediate educational unit under subsection (a) of this section if the State educational agency determines that such application meets the requirements of subsection (a) of this section, except that no such application may be approved until the State plan submitted by such State educational agency under subsection (a) of this section is approved by the Commissioner under section 1413(c) of this title. A State educational agency shall disapprove any application submitted by a local educational agency or an intermediate educational unit under subsection (a) of this section if the State educational agency determines that such application does not meet the requirements of subsection (a) of this section.

(2)(A) Whenever a State educational agency, after reasonable notice and opportunity for a hearing, finds that a local educational agency or an intermediate educational unit, in the administration of an application approved by the State educational agency under paragraph (1), has failed to comply with any requirement set forth in such application, the State educational agency, after giving appropriate notice to the local educational agency or the intermediate educational unit, shall --

(i) make no further payments to such local educational agency or such intermediate educational unit under section 1420 of this title until the State educational agency is satisfied that there is no longer any failure to comply with the requirement involved; or

(ii) take such finding into account

in its review of any application made by such local educational agency or such intermediate educational unit under subsection (a) of this section.

(B) The provisions of the last sentence of section 1416(a) of this title shall apply to any local educational agency or any intermediate educational unit receiving any notifications from a State educational agency under this paragraph.

(3) In carrying out its functions under paragraph (1), each State educational agency shall consider any decision made pursuant to a hearing held under section 1415 of this title which is adverse to the local educational agency or intermediate educational unit involved in such decision.

Consolidated applications

(c)(1) A State educational agency may, for purposes of the consideration and approval of applications under this section, require local educational agencies to submit a consolidated application for payments if such State educational agency determines that any individual application submitted by any such local educational agency will be disapproved because such local educational agency is ineligible to receive payments because of the application of section 1411(c)(4)(A)(i) of this title or such local educational agency would be unable to establish and maintain programs of sufficient size and scope to effectively meet the educational needs of handicapped children.

(2)(A) In any case in which a consolidated application of local educational agencies is approved by a State educational agency under paragraph (1), the payments which such local educational agencies may receive shall be equal to the sum of payments to which each such local educational agency would be entitled under section 1411(d) of this title if an individual application of any such local educational agency had been approved.

(B) The State educational agency shall prescribe rules and regulations with respect to consolidated applications submitted under this subsection which are consistent with the provisions of paragraph (1) through paragraph (7) of section 1412 and section 1413(a) of this title and which provide participating local educational agencies with joint responsibilities for implementing programs receiving payments under this subchapter.

(C) In any case in which an intermediate educational unit is required pursuant to State law to carry out the provisions of this subchapter, the joint responsibilities given to local educational agencies under subparagraph (B) shall not apply to the administration and disbursement of any payments received by such intermediate educational unit. Such responsibilities shall be carried out exclusively by such intermediate educational unit.

Special education and related services provided directly by State educational agencies; regional or State centers

(d) Whenever a State educational agency determines that a local educational agency --

(1) is unable or unwilling to establish and maintain programs of free appropriate public education which meet the requirements established in subsection (a) of this section;

(2) is unable or unwilling to be consolidated with other local educational agencies in order to establish and maintain such programs; or

(3) has one or more handicapped children who can best be served by a regional or State center designed to meet the needs of such children;

the State educational agency shall use the payments which would have been available to such local educational agency to provide special educational and related services directly to handicapped children residing in the area served by such local educational agency. The State educational agency may provide such education and services in such manner, and at such locations (including regional or State centers), as it considers appropriate, except that the manner in which such education and services are provided shall be consistent with the requirements of this subchapter.

Reallocation of funds

(e) Whenever a State educational agency determines that a local educational agency is adequately providing a free ap-

propriate public education to all handicapped children residing in the area served by such agency with State and local funds otherwise available to such agency, the State educational agency may reallocate funds (or such portion of those funds as may not be required to provide such education and services) made available to such agency, pursuant to section 1411(d) of this title, to such other local educational agencies within the State as are not adequately providing special education and related services to all handicapped children residing in the areas served by such other local educational agencies.

Programs using State or local funds

(f) Notwithstanding the provisions of subsection (a)(2)(B)(ii) of this section, any local educational agency which is required to carry out any program for the education of handicapped children pursuant to a State law shall be entitled to receive payments under section 1411(d) of this title for use in carrying out such program, except that such payments may not be used to reduce the level of expenditures for such program made by such local educational agency from State or local funds below the level of such expenditures for the fiscal year prior to the fiscal year for which such local educational agency seeks such payments.

1415. Procedural safeguards

Establishment and maintenance

(a) Any State educational agency, any local educational agency, and any in-

termediate educational unit which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

Required procedures; hearing

(b)(1) The procedures required by this section shall include, but shall not be limited to --

(A) an opportunity for the parents or guardian of a handicapped child to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational ageny, or intermediate educational unit involved in the education or care of the child) to act as surrogate for the parents or guardian;

(C) written prior notice to the parents or guardian of the child whenever such agency or unit --

(i) proposes to initiate or change, or

(ii) refuses to initiate or change,

the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause (C) fully inform the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate education unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

Review of local decision by State educational agency

(c) If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate education unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

Enumeration of rights accorded parties to hearings

(d) Any party to any hearing conducted pursuant to subsections (b) and (c) of this section shall be accorded (1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children, (2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses; (3) the right to a written or electronic verbatim record of such hearing, and (4) the right to written findings of fact and decisions (which findings and decisions shall also be transmitted to the advisory panel established pursuant to section 1413(a)(12) of this title).

Civil action; jurisdiction

(e)(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and

paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

(4) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

1416. Withholding of payments; judicial review

(a) Whenever the Commissioner, after reasonable notice and opportunity for hearing to the State educational agency involved (and to any local educational agency or intermediate educational unit affected by any failure described in clause (2)), finds --

(1) that there has been a failure to comply substantially with any provision of section 1412 or section 1413 of this title, or

(2) that in the administration of the State plan there is a failure to comply with any provision of this subchapter or with any requirements set forth in the application of a local educational agency or intermediate educational unit approved by the State educational agency pursuant to the State plan,

the Commissioner (A) shall, after notifying the State educational agency, withhold any further payments to the State under this subchapter, and (B) may, after notifying the State educational agency, withhold further payments to the State under the Federal programs specified in section 1413(a)(2) of this title within his jurisdiction, to the extent that funds under such programs are available

for the provision of assistance for the education of handicapped children. If the Commissioner withholds further payments under clause (A) or clause (B) he may determine that such withholding will be limited to programs or projects under the State plan, or portions thereof, affected by the failure, or that the State educational agency shall not make further payments under this subchapter to specified local educational agencies or intermediate educational units affected by the failure. Until the Commissioner is satisfied that there is no longer any failure to comply with the provisions of this subchapter, as specified in clause (1) or clause (2), no further payments shall be made to the State under this subchapter or under the Federal programs specified in section 1413(a)(2) of this title within his jurisdiction to the extent that funds under such programs are available for the provision of assistance for the education of handicapped children, or payments by the State educational agency under this subchapter shall be limited to local educational agencies and intermediate educational units whose actions did not cause or were not involved in the failure, as the case may be. Any State educational agency, local educational agency, or intermediate educational unit in receipt of a notice pursuant to the first sentence of this subsection shall, by means of a public notice, take such measures as may be necessary to bring the pendency of an action pursuant to this subsection to the attention of the public within the jurisdiction of such agency or unit.

(b)(1) If any State is dissatisfied

with the Commissioner's final action with respect to its State plan submitted under section 1413 of this title, such State may, within sixty days after notice of such action, file with the United States court of appeals for the circuit in which such State is located a petition for review of that action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Commissioner. The Commissioner thereupon shall file in the court the record of the proceedings on which he based his action, as provided in section 2112 of Title 28.

(2) The findings of fact by the Commissioner, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to the Commissioner to take further evidence, and the Commissioner may thereupon make new or modified findings of fact and may modify his previous action, and shall file in the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(3) Upon the filing of such petition, the court shall have jurisdiction to affirm the action of the Commissioner or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

1417. Administration

Duties of Commissioner

(a)(1) In carrying out his duties under this subchapter, the Commissioner shall --

(A) cooperate with, and furnish all technical assistance necessary, directly or by grant or contract, to the States in matters relating to the education of handicapped children and the execution of the provisions of this subchapter;

(B) provide such short-term training programs and institutes as are necessary;

(C) disseminate information, and otherwise promote the education of all handicapped children within the States; and

(D) assure that each State shall, within one year after November 29, 1975, provide certification of the actual number of handicapped children receiving special education and related services in such State.

(2) As soon as practicable after November 29, 1975, the Commissioner shall, by regulation, prescribe a uniform financial report to be utilized by State educational agencies in submitting State plans under this subchapter in order to assure equity among the States.

Rules and regulations

(b) In carrying out the provisions of this subchapter, the Commissioner (and the Secretary, in carrying out the pro-

visions of subsection (c) of this section) shall issue, not later than January 1, 1977, amend, and revoke such rules and regulations as may be necessary. No other less formal method of implementing such provisions is authorized.

Protection of rights and privacy of parents and students

(c) The Secretary shall take appropriate action, in accordance with the provisions of section 1232g of this title, to assure the protection of the confidentiality of any personally identifiable data, information, and records collected or maintained by the Commissioner and by State and local educational agencies pursuant to the provisions of ths subchapter.

Hiring of qualified personnel

(d) The Commissioner is authorized to hire qualified personnel necessary to conduct data collection and evaluation activities required by subsections (b), (c) and (d) of section 1418 of this title and to carry out his duties under subsection (a)(1) of this section without regard to the provisions of Title 5 relating to appointments in the competitive service and without regard to chapter 51 and subchapter III of chapter 53 of such title relating to classification and general schedule pay rates except that no more than twenty such personnel shall be employed at any time.

1418. Evaluation

Duty of Commissioner

(a) The Commissioner shall measure and evaluate the impact of the program authorized under this subchapter and the effectiveness of State efforts to assure the free appropriate public education of all handicapped children.

Studies and investigations

(b) The Commissioner shall conduct, directly or by grant or contract, such studies, investigations, and evaluations as are necessary to assure effective implementation of this subchapter. In carrying out his responsibilities under this section, the Commissioner shall --

(1) through the National Center for Education Statistics provide to the appropriate committees of each House of the Congress and to the general public at least annually, and shall update at least annually, programmatic information concerning programs and projects assisted under this subchapter and other Federal programs supporting the education of handicapped children, and such information from State and local educational agencies and other appropriate sources necessary for the implementation of this subchapter, including --

(A) the number of handicapped children in each State, within each disability, who require special education and related services;

(B) the number of handicapped children in each State, within each dis-

ability, receiving a free appropriate public education and the number of handicapped children who need and are not receiving a free appropriate public education in each such State;

(C) the number of handicapped children in each State, within each disability, who are participating in regular educational programs, consistent with the requirements of section 1412(5)(B) and section 1414(a)(1)(C)(iv) of this title, and the number of handicapped children who have been placed in separate classes or separate school facilities, or who have been otherwise removed from the regular eduation environment;

(D) the number of handicapped children who are enrolled in public or private institutions in each State and who are receiving a free appropriate public education, and the number of handicapped children who are in such institutions and who are not receiving a free appropriate public education;

(E) the amount of Federal, State, and local expenditures in each State specifically available for special education and related services; and

(F) the number of personnel, by disability category, employed in the education of handicapped children, and the estimated number of additional personnel needed to adequately carry out the policy established by this chapter; and

(2) provide for the evaluation of programs and projects assisted under this subchapter through --

(A) the development of effective methods and procedures for evaluation;

(B) the testing and validation of such evaluation methods and procedures; and

(C) conducting actual evaluation studies designed to test the effectiveness of such programs and projects.

Data sample

(c) In developing and furnishing information under subclause (E) of clause (1) of subsection (b) of this section, the Commissioner may base such information upon a sampling of data available from State agencies, including the State educational agencies, and local educational agencies.

Annual reports to congressional committees

(d)(1) Not later than one hundred twenty days after the close of each fiscal year, the Commissioner shall transmit to the appropriate committees of each House of the Congress a report on the progress being made toward the provision of free appropriate public education to all handicapped children, including a detailed description of all evaluation activities conducted under subsection (b) of this section.

(2) The Commissioner shall include in each such report --

(A) an analysis and evaluation of the effectiveness of procedures under-

taken by each State educational agency, local educational agency, and intermediate educational unit to assure that handicapped children receive special education and related services in the least restrictive environment commensurate with their needs and to improve programs of instruction for handicapped children in day or residential facilities;

(B) any recommendations for change in the provisions of this subchapter, or any other Federal law providing support for the education of handicapped children; and

(C) any evaluation of the effectiveness of the procedures undertaken by each such agency or unit to prevent erroneous classification of children as eligible to be counted under section 1411 of this title, including actions undertaken by the Commissioner to carry out provisions of this chapter relating to such erroneous classification.

In order to carry out such analyses and evaluations, the Commissioner shall conduct a statistically valid survey for assessing the effectiveness of individualized educational programs.

Authorization of appropriations

(e) There are authorized to be appropriated for each fiscal year such sums as may be necessary to carry out the provisions of this section.

1419. Incentive grants

Authority to make grants

(a) The Commissioner shall make a grant to any State which --

(1) has met the eligibility requirements of section 1412 of this title;

(2) has a State plan approved under section 1413 of this title; and

(3) provides special education and related services to handicapped children aged three to five, inclusive, who are counted for the purposes of section 1411 (a)(1)(A) of this title.

The maximum amount of the grant for each fiscal year which a State may receive under this section shall be $300 for each such child in that State.

Application

(b) Each State which --

(1) has met the eligibility requirements of section 1412 of this title,

(2) has a State plan approved under section 1413 of this title, and

(3) desires to receive a grant under this section,

shall make an application to the Commissioner at such time, in such manner, and containing or accompanied by such information, as the Commissioner may reasonably require.

Payment

(c) The Commissioner shall pay to each State having an application approved under subsection (b) of this section the amount to which the State is entitled under this section, which amount shall be used for the purpose of providing the services specified in clause (3) of subsection (a) of this section.

Ratable reduction or increase of payments

(d) If the sums appropriated for any fiscal year for making payments to States under this section are not sufficient to pay in full the maximum amounts which all States may receive under this subchapter for such fiscal year, the maximum amounts which all States may receive under this subchapter for such fiscal year shall be ratably reduced. In case additional funds become available for making such payments for any fiscal year during which the preceding sentence is applicable, such reduced amounts shall be increased on the same basis as they were reduced.

Authorization of appropriations

(e) In addition to the sums necessary to pay the entitlements under section 1411 of this title, there are authorized to be appropriated for each fiscal year such sums as may be necessary to carry out the provisions of this section.

1420. Payments

(a) The Commissioner shall make

payments to each State in amounts which the State educational agency of such State is eligible to receive under this subchapter. Any State educational agency receiving payments under this subsection shall distribute payments to the local educational agencies and intermediate educational units of such State in amounts which such agencies and units are eligible to receive under this subchapter after the State educational agency has approved applications of such agencies or units for payments in accordance with section 1414(b) of this title.

(b) Payments under this subchapter may be made in advance or by way of reimbursement and in such installments as the Commissioner may determine necessary.

* * *

Education of the Handicapped Regulations
ASSISTANCE TO STATES FOR EDUCATION OF HANDICAPPED CHILDREN (45 Code of Federal Regulations Part 121a)

Subpart A - General

PURPOSE, APPLICABILITY, AND GENERAL PROVISIONS REGULATIONS

Reg. 121a.1 Purpose.

The purpose of this part is:

(a) To insure that all handicapped children have available to them a free appropriate public education which includes special education and related services to meet their unique needs.

(b) To insure that the rights of handicapped children and their parents are protected.

(c) To assist States and localities to provide for the education of all handicapped children, and

(d) To assess and insure the effectiveness of efforts to educate those children.

Reg. 121a.2 Applicability to State, local, and private agencies.

(a) States. This part applies to each State which receives payments under Part B of the Education of the Handicapped Act.

(b) Public agencies within the State. The annual program plan is submitted by the State educational agency

on behalf of the State as a whole. Therefore, the provisions of this part apply to all political subdivisions of the State that are involved in the education of handicapped children. These would include: (1) The State educational agency, (2) local educational agencies and intermediate educational units, (3) other State agencies and schools (such as Departments of Mental Health and Welfare and State schools for the deaf or blind), and (4) State correctional facilities.

(c) Private schools and facilities. Each public agency in the State is responsible for insuring that the rights and protections under this part are given to children referred to or placed in private schools and facilities by that public agency.

Reg. 121a.3 General provisions regulations.

Assistance under Part B of the Act is subject to Parts 100, 100b, and 121 of this chapter, which include definitions and requirements relating to fiscal, administrative, property management, and other matters.

Reg. 121a.4 Free appropriate public education.

As used in this part, the term "free appropriate public education" means special education and related services which:

(a) Are provided at public expense, under public supervision and direction, and without charge.

(b) Meet the standards of the State educational agency, including the requirements of this part.

(c) Include preschool, elementary school, or secondary school education in the State involved, and

(d) Are provided in conformity with an individualized education program which meets the requirements under Sections 121a.340-121a.349 of Subpart C.

Reg. 121a.5 Handicapped children.

(a) As used in this part, the term "handicapped children" means those children evaluated in accordance with Sections 121a.530-121a.534 as being mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, other health impaired, deaf-blind, multi-handicapped, or as having specific learning disabilities, who because of those impairments need special education and related services.

(b) The terms used in this definition are defined as follows:

(1) "Deaf" means a hearing impairment which is so severe that the child is impaired in processing linguistic information through hearing, with or without amplification, which adversely affects educational performance.

(2) "Deaf-blind" means concomitant hearing and visual impairments, the combination of which causes such severe communication and other developmental and educational problems that they cannot be accomodated in special education programs solely for deaf or blind children.

(3) "Hard of Hearing" means a hearing impairment, whether permanent or fluctuating, which adversely affects a child's educational performance but which is not included under the definition of "deaf" in this section.

(4) "Mentally retarded" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period, which adversely affects a child's educational performance.

(5) "Multihandicapped" means concomitant impairments (such as mentally retarded-blind, mentally retarded-orthopedically impaired, etc.), the combination of which causes such severe educational problems that they cannot be accommodated in special education programs solely for one of the impairments. The term does not include deaf-blind children.

(6) "Orthopedically impaired" means a severe orthopedic impairement which adversely affects a child's educational performance. The term includes impairments caused by congenital anomaly (e.g., clubfoot, absence of some member, etc.), impairments caused by disease (e.g., poliomyelitis, bone tuberculosis, etc.), and impairments from other causes (e.g., cerebral palsy, amputations, and fractures or burns which cause contractures).

(7) "Other health impaired" means limited strength, vitality or alertness, due to chronic or acute health problems such as a heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia, epilepsy, lead poisoning, leukemia, or diabetes,

which adversely affects a child's educational performance.

(8) "Seriously emotionally disturbed" is defined as follows:

(i) The term means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree, which adversely affects educational performance:

(A) An inability to learn which cannot be explained by intellectual, sensory, or health factors;

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;

(C) Inappropriate types of behavior or feelings under normal circumstances;

(D) A general pervasive mood of unhappiness or depression; or

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(ii) The term includes children who are schizophrenic or autistic. The term does not include children who are socially maladjusted, unless it is determined that they are seriously emotionally disturbed.

(9) "Specific learning disability" means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations. The term includes such conditions as perceptual handicaps, brain injury, minimal brain disfunction, dyslexia, and developmental aphasia. The term does not include

children who have learning problems which are primarily the result of visual, hearing, or motor handicaps, of mental retardation, of emotional disturbance, or of environmental, cultural, or ecomonic disadvantage.

(10) "Speech impaired" means a communication disorder such as stuttering, impaired articulation, a language impairment, or a voice impairment, which adversely affects a child's educational performance.

(11) "Visually handicapped" means a visual impairment which, even with correction, adversely affects a child's educational performance. The term includes both partially seeing and blind children.

Reg. 121a.6 Include.

As used in this part, the term "include" means that the items named are not all of the possible items that are covered, whether like or unlike the ones named.

Reg. 121a.7 Intermediate educational unit.

As used in this part, the term "intermediate educational unit" means any public authority, other than a local educational agency, which:

(a) Is under the general supervision of a State educational agency;

(b) Is established by State law for the purpose of providing free public education on a regional basis; and

(c) Provides special education and related services to handicapped children within that State.

Reg. 121a.8 Local educational agency.

(a) As used in this part, the term "local educational agency" means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State or such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools. Such term also includes any other public institution or agency having administrative control and direction of a public elementary or secondary school.

(b) For the purposes of this part, the term "local educational agency" also includes intermediate educational units.

Reg. 121a.9 Native language.

As used in this part the term "native language" has the meaning given that term by section 703(a)(2) of the Bilingual Education Act, which provides as follows:

The term "native language", when used with reference to a person of limited English-speaking ability, means the language normally used by that person, or in the case of a child, the language normally used by the parents of the child.

Reg. 121a. 10 Parent.

As used in this part, the term "parent" means a parent, guardian, a person acting as a parent of a child, or a surrogate parent who has been appointed in accordance with Section 121a.514. The term does not include the State if the child is a ward of the State.

Reg. 121a.11 Public agency.

As used in this part, the term "public agency" includes the State educational agency, local educational agencies, intermediate educational units, and any other political subdivisions of the State which are responsible for providing education to handicapped children.

Reg. 121a.12 Qualified.

As used in this part, the term "qualified" means that a person has met State educational agency approved or recognized certification, licensing, registration, or other comparable requirements which apply to the area in which he or she is providing special education or related services.

Reg. 121a.13 Related services.

(a) As used in this part, the term "related services" means transportation and such developmental, corrective, and other supportive services as are required to assist a handicapped child to benefit from special education, and includes speech pathology and audiology, psychological services, physical and occupational therapy, recreation, early identification and assessment of disa-

bilities in children, counseling services, and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, and parent counseling and training.

(b) The terms used in this definition are defined as follows:

(1) "Audiology" includes:

(i) Identification of children with hearing loss;

(ii) Determination of the range,nature, and degree of hearing loss, including referral for medical or other professional attention for the habilitation of hearing;

(iii)Provision of habilitative activities, such as language habilitation, auditory training, speech reading (lip-reading), hearing evaluation, and speech conservation;

(iv) Creation and administration of programs for prevention of hearing loss;

(v) Counseling and guidance of pupils, parents, and teachers regarding hearing loss; and

(vi) Determination of the child's need for group and individual amplification, selecting and fitting an appropriate aid, and evaluating the effectiveness of amplification.

(2) "Counseling services" means services provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel.

(3) "Early identification" means the implementation of a formal plan for identifying a disability as early as possible in a child's life.

(4) "Medical services" means services provided by a licensed physician

to determine a child's medically related handicapping condition which results in the child's need for special education and related services.

(5) "Occupational therapy" includes:

(i) Improving, developing or restoring functions impaired or lost through illness, injury, or deprivation;

(ii) Improving ability to perform tasks for independent functioning when functions are impaired or lost; and

(iii) Preventing, through early intervention, initial or further impairment or loss of function.

(6) "Parent counseling and training" means assisting parents in understanding the special needs of their child and providing parents with information about child development.

(7) "Physical therapy" means services provided by a qualified physical therapist.

(8) "Psychological services" include:

(i) Administering psychological and educational tests, and other assessment procedures;

(ii) Interpreting assessment results;

(iii) Obtaining, integrating, and interpreting information about child behavior and conditions relating to learning.

(iv) Consulting with other staff members in planning school programs to meet the special needs of children as indicated by psychological tests, interviews, and behavioral evaluations; and

(v) Planning and managing a program of psychological services, including psychological counseling for child-

ren and parents.

(9) "Recreation" includes:

(i) Assessment of leisure function;

(ii) Therapeutic recreation services;

(iii) Recreation programs in schools and community agencies; and

(iv) Leisure education.

(10) "School health services" means services provided by a qualified school nurse or other qualified person.

(11) "Social work services in schools" include:

(i) Preparing a social or developmental history on a handicapped child;

(ii) Group and individual counseling with the child and family;

(iii) Working with those problems in a child's living situation (home, school, and community) that affect the child's adjustment in school; and

(iv) Mobilizing school and community resources to enable the child to receive maximum benefit from his or her educational program.

(12) "Speech pathology" includes:

(i) Identification of children with speech or language disorders;

(ii) Diagnosis and appraisal of specific speech or language disorders;

(iii) Referral for medical or other professional attention necessary for the habilitation of speech or language disorders;

(iv) Provisions of speech and language services for the habilitation or prevention of communicative disorders; and

(v) Counseling and guidance of parents, children, and teachers regarding speech and language disorders.

(13) "Transportation" includes:

(i) Travel to and from school and between schools,

(ii) Travel in and around school buildings, and

(iii) Specialized equipement (such as special or adapted buses, lifts, and ramps), if required to provide special transportation for a handicapped child.

Reg. 121a.14 Special education.

(a)(1) As used in this part, the term "special education" means specially designed instruction, at no cost to the parent, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.

(2) The term includes speech pathology, or any other related service, if the service consists of specially designed instruction, at no cost to the parents, to meet the unique needs of a handicapped child, and is considered "special education" rather than a "related service" under State standards.

(3) The term also includes vocational education if it consists of specially designed instruction, at no cost to the parents, to meet the unique needs of a handicapped child.

(b) The terms in this definition are defined as follows:

(1) "At no cost" means that all specially designed instruction is provided without charge, but does not preclude incidental fees which are normally charged to nonhandicapped students or their parents as a part of the regular

education program.

(2) "Physical education" is defined as follows:

(i) The term means the development of:

(A) Physical and motor fitness;

(B) Fundamental motor skills and patterns; and

(C) Skills in aquatics, dance, and individual and group games and sports (including intramural and lifetime sports).

(ii) The term includes special physical education, adapted physical education, movement education, and motor development.

(3) "Vocational education" means organized educational programs which are directly related to the preparation of individuals for paid or unpaid employment, or for additional preparation for a career requiring other than a baccalaureate or advanced degree.

Reg. 121a.15 State.

As used in this part, the term "State" means each of the several States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands.

Subpart B - State Annual Program Plans and Local Applications

ANNUAL PROGRAM PLANS - GENERAL

Reg. 121a.110 Condition of assistance.

In order to receive funds under

Part B of the Act for any fiscal year, a State must submit an annual program plan to the Commissioner through its State educational agency.

Reg. 121a.111 Contents of plan.

Each annual program plan must contain the provisions required in this subpart.

Reg. 121a.112 Certification by the State educational agency and attorney general.

Each annual program plan must include:

(a) A certification by the officer of the State educational agency authorized to submit the plan that:

(1) The plan has been adopted by the State educational agency, and

(2) The plan is the basis for the operation and administration of the activities to be carried out in that State under Part B of the Act; and

(b) A certification by the State Attorney General or other authorized State legal officer that:

(1) The State educational agency has authority under State law to submit the plan and to administer or to supervise the administration of the plan, and

(2) All plan provisions are consistent with State law.

Reg. 121a.113 Approval; disapproval.

(a) The Commissioner shall approve any annual program plan which meets the requirements of this part and SubpartB of Part 100b of this chapter.

(b) The Commissioner shall disapprove any annual program plan which does not meet those requirements but may not finally disapprove a plan before giving reasonable notice and an opportunity for a hearing to the State educational agency.

(c) The Commissioner shall use the procedures set forth in Sections 121a.580-121a.583 of Subpart E for a hearing under this section.

Reg. 121a.114 Effective period of annual program plan.

(a) Each annual program plan is effective for a period from the date it becomes effective under Section 100b.35 of this chapter through the following June 30.

(b) The Commissioner may extend the effective period of an annual program plan, on the request of a State, if the plan meets the requirements of this part and Part B of the Act.

ANNUAL PROGRAM PLANS - CONTENTS

Reg. 121a.120 Public participation.

(a) Each annual program plan must include procedures which insure that the requirements in Sections 121a.280-121a.284 are met.

(b) Each annual program must also include the following:

(1) A statement describing the methods used by the State educational agency to provide notice of the public hearings on the annual program plan. The statement must include:

(i) A copy of each news release and advertisement used to provide notice.

(ii) A list of the newspapers and other media in which the State educational agency announced or published the notice, and

(iii)The dates on which the notice was published.

(2) A list of the dates and locations of the public hearings on the annual program plan.

(3) A summary of comments received by the State educational agency and a description of the modifications that the State educational agency has made in the annual program plan as a result of the comments.

(4) A statement describing the methods by which the annual program plan will be made public after its approval by the Commissioner. This statement must include the information required under paragraph (b)(1) of this section.

Reg. 121a.121 Right to a free appropriate public education.

(a) Each annual program plan must include information which shows that the State has in effect a policy which insures that all handicapped children have the right to a free appropriate public education within the age ranges and timelines under Section 121a.122.

(b) The information must include a copy of each State statute, court order, State Attorney General opinion, and other State document that shows the source of the policy.

(c) The information must show that

the policy:

(1) Applies to all public agencies in the State;

(2) Applies to all handicapped children;

(3) Implements the priorities established under Section 121a.127(a)(1) of this subpart; and

(4) Establishes timeliness for implementing the policy, in accordance with Section 121a.122.

Reg. 121a.122 Timelines and ages for free appropriate public education.

(a) General. Each annual program plan must include in detail the policies and procedures which the State will undertake or has undertaken in order to insure that a free appropriate education is available for all handicapped children aged three through eighteen within the State not later than September 1, 1978, and for all handicapped children aged three through twenty-one within the State not later than September 1, 1980.

(b) Documents relating to timeliness. Each annual program plan must include a copy of each statute, court order, attorney general decision, and other State document which demonstrates that the State has established timelines in accordance with paragraph (a) of this section.

(c) Exception. The requirement in paragraph (a) of this section does not apply to a State with respect to handicapped children aged three, four, five, eighteen, nineteen, twenty, or twenty-one to the extent that the requirement would be inconsistent with State law or

practice, or the order of any court, respecting public education for one or more of those age groups in the State.

(d) Documents relating to exceptions. Each annual program plan must:

(1) Describe in detail the extent to which the exception in paragraph (c) of this section applies to the State; and

(2) Include a copy of each State law, court order, and other document which provides a basis for the exception.

Reg. 121a.123 Full educational opportunity goal.

Each annual program plan must include in detail the policies and procedures which the State will undertake, or has undertaken, in order to insure that the State has a goal of providing full educational opportunity to all handicapped children aged birth through twenty-one.

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Reg. 121a.550 General.

(a) Each State educational agency shall insure that each public agency establishes and implements procedures which meet the requirements of Sections 121a.550-121a.556.

(b) That to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and

(2) That special classes, separate

schooling or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

Reg. 121a.551 Continuum of alternative placements.

(a) Each public agency shall insure that a continuum of alternative placements is available to meet the needs of handicapped children for special education and related services.

(b) The continuum required under paragraph (a) of this section must:

(1) Include the alternative placements listed in the definition of special education under Sectin 121a.13 of Subpart A (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions), and

(2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

REGULATIONS OF THE NEW YORK STATE
COMMISSIONER OF EDUCATION

8 N.Y.C.R.R. 200.4(d)(4)
(Revised as of 1979)

(4) Resource programs for hearing impaired. Hearing impaired pupils shall be provided daily instructional programs.
  (i) Individual service shall be provided by a certified teacher of the speech and hearing handicapped for hard of hearing children for a minimum of 30 minutes a day, 5 days per week.
  (ii) Individual service by a certified teacher of the deaf shall be provided to deaf pupils for a minimum of 1 hour, 5 days per week.

8 N.Y.C.R.R. 200.4(e)(4)
(Revised as of 1980)

(4) Resource room programs for hearing impaired. Hearing impaired pupils shall be provided daily instructional programs.
  (i) Individual service shall be provided for hard of hearing pupils for a minimum of 30 minutes a day, five days per week.
  (ii) Individual service shall be provided to deaf pupils for a minimum of one hour, five days per week.